Supreme Court, U.S.
FILED

(1) 961325 FEB 18 1997

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

MOUNT JUNEAU ENTERPRISES, INC.,
ALASKA TRAMS, INC., ARNT I. ANTONSEN,
CHARLES KEEN AND KAREN KEEN
Petitioners

v.

THE CITY AND BOROUGH OF JUNEAU
(a municipal corporation), et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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25 pp

I. QUESTIONS PRESENTED FOR REVIEW.

1. May a governmental entity deprive a private property owner of his due process right to compensation for taking private property through a scheme wherein the governmental entity received a fraudulent deed from a third party without the property interest to convey, (and then enter into a joint profit agreement with the third party as part of the sham transaction), which lack of property interest the governmental entity knew but then used to justify the failure to condemn the property and circumvent payment for the property under the Fifth and Fourteenth Amendment of the United States Constitution and Article I, Section 18 of the Alaska Constitution, without just compensation?

2. May a governmental entity enter into a contract settling a dispute with a private property owner over taking of private property for use as a water reservoir by exchanging other property as compensation and then unilaterally abrogate the contract and extinguish the existing property rights without exercising the power of eminent domain and compensating the private property owner for taking of his property without just compensation?

3. May a government entity impair the ability of the owner of a building permit to utilize his building permit, effectively taking the building permit owner's property interest in the building permit, without just compensation?

II. TABLE OF CONTENTS

I. QUESTIONS PRESENTED FOR REVIEW i

II. TABLE OF CONTENTS ii

III. TABLE OF CITED AUTHORITIES iv

IV. OPINION IN THE CASE 1

V. GROUNDS FOR JURISDICTION 1

VI. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED 2

VII. STATEMENT OF THE CASE AND BASIS FOR JURISDICTION IN COURT OF FIRST INSTANCE 2

VIII. REASONS FOR GRANTING CERTIORARI . 13

A. It Is Fundamentally Unfair And A Violation Of Basic Due Process For Private Property To Be Taken Through A Fraudulent Conveyance To A Governmental Entity To Avoid Paying Just Compensation 13

B. It Is Fundamentally Unfair And A Violation Of Due Process For A Governmental Entity To Abrogate A Contract And Therefore Extinguish Property Rights Without Just Compensation 14

C. It Is Fundamentally Unfair And A Violation Of Due Process To Destroy The Value Of A Building Permit By Impeding The Ability Of The Permit Holder To Effectively Use The Permit And Such Government Action Amounts To Taking Without Just Compensation 16

IX. SUMMARY AND CONCLUSIONS 18

III. TABLE OF CITED AUTHORITIES

CONSTITUTIONAL PROVISIONS:

Fifth Amendment, United States Constitution . . . . .iv, 2, 14

Fourteenth Amendment, United States Constitution . iv, 2, 14

Art. I §18, Alaska Constitution . . . . . iv, 2

CASES:

City of Cincinnati v. Louisville & Nashville R. Co.,
223 U.S. 390, 400 (1912) . . . . . iv, 16

Lenoir v. Porters Creek Watershed District,
586 F.2d 1081, 1093 (6th Cir. 1978) . . . . . iv, 18

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922) . . . . . .iv, 18

State, Department of Highways v. Crosby,
410 P.2d 724, 728-729 (Alaska 1966) . . . . . .iv, 13

United States v. Causby,
328 U.S. 256 (1946) . . . . . .iv, 18

Webb's Fabulous Pharmacies Inc. v. Beckwith,
449 U.S. 155, 159 (1980) . . . . . .iv, 14

OTHER AUTHORITIES:

The Law of Municipal Corporations
(3rd Ed. Revised 1986) at Sec. 26.01a . . . . . v, 16

The Law of Municipal Corporations
(3rd Ed. 1988 Revised), Sec. 20.46 . . . . . .v, 15

The Law of Municipal Corporations
(3rd Ed. 1990 Revised),Sec. 29.03 . . . . . .v, 14

Rotunda & Nowak
Treatise on Constitutional Law:
Substance and Procedure, 2nd § 15.12 . . . . . .v, 18

Williston on Contracts
at 282-283 (4th Ed. 1990) . . . . . .v, 14

Petitioners respectfully pray a Writ of Certiorari issue to review the judgment and opinion herein of the final Opinion of the Alaska Supreme Court entered in this proceeding on September 6, 1996. The Alaska Supreme Court denied Petitioners Petition for Rehearing on November 22, 1996 as to said Opinion.

IV. OPINION BELOW

The Alaska Supreme Court on September 26, 1996, Opinion No. 4396, affirmed an Alaska Superior Court decision dated January 31, 1994 granting summary judgment to the City and Borough of Juneau ("City") in regard to Petitioners claims of taking property without just compensation. The City took Petitioners' mining tunnel and filled it with water to use as a reservoir without condemning the property or compensating private property interests; abrogated a contract which settled the tunnel seizure by granting property rights in exchange for the tunnel confiscation and thus resulted in taking of property without just compensation as well as impairment of the obligation of contracts, and as a tactical ploy to gain advantage in ongoing civil litigation as to said seizure, willfully impaired Petitioners efforts to construct a tramway under a building permit after the Petitioners had expended hundreds of thousands of dollars and time on the project, resulting in a taking of the building permit without just compensation. A timely Petition for Rehearing was denied on November 20, 1996.

V. GROUNDS FOR JURISDICTION.

A decision of the Superior Court of the State of Alaska was entered on January 31, 1994. Pursuant to Alaska Supreme Court Rules of Appellate Procedure, a timely appeal in the Alaska Supreme Court was filed. The opinion of the Alaska Supreme Court was issued September 6, 1996 and rehearing denied November 20, 1996.

Jurisdiction is invoked under Rule 10 of the United States Supreme Court Rules of Appellate Procedure. The instant petition is timely filed under Supreme Court Rule 13 since

filed within 90 days after the effective date of the final denial of Petitioners Petition for Rehearing by the Alaska Supreme Court.

VI. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED.

This case involves the right of due process for a property owner to just compensation for the taking of his property interests under the Fifth and Fourteenth amendments to the United States Constitution, and Article I Section 18 of the Alaska Constitution.

VII. STATEMENT OF THE CASE AND BASIS FOR JURISDICTION IN COURT OF FIRST INSTANCE.

Charles Keen, an ex-logger and a filmmaker, planned to turn a tunnel, known as Tunnel No. 3 into a tourist attraction. This tunnel ran under the Red Jacket and White Wing mining claims. Mr. Keen learned that Leonard Idso had been paying the taxes on the Red Jacket, White Wing and Black Diamond mining claims and in 1972 he acquired an option to purchase the claims from Mr. Idso. In 1981 Mr. Keen exercised the option and obtained the three claims. Mr. and his wife, Karen Keen, then quitclaimed their interest in the claims to Alaska Trams on October 22, 1981. Alaska Trams was, and is, intent on building a tramway tourist ride to the top of Mt. Juneau, utilizing the surface rights of the mining claim for a portion of the access on Mt. Juneau and Mt. Roberts.

The basic issues involve the City taking property rights to a mining tunnel for use as a city reservoir without formal condemnation proceedings, due process or any just compensation. After resolving the dispute by a city ordinance forming a contract which conveyed certain property rights as just compensation for the taking of the mining tunnel the City decided the tunnel claim was worth less than the property rights contractually agreed upon as compensation for taking the tunnel.

As part of a scheme to obstruct the building of the tramway and obtain an advantage the City abrogated the contract it had entered by ordinance to settle these tunnel claims, which was to convey certain property rights, to wit, an easement, air rights, and real property. Petitioners needed these properties to develop the tramway tourist attraction to the top of Mount Juneau, utilizing their surface rights to the mining claims.

In the process of abrogating this contract so as to gain such inappropriate tactical advantage and take the tunnel without just compensation the City also willfully destroyed Petitioners ability to utilize building permits for the tramway project, permits that had cost hundreds of thousands of dollars in direct costs and reliance costs.

In 1913, the owners of the mining claims granted Alaska-Juneau Gold Mining Company ("Alaska-Juneau") a limited easement to construct and maintain a transit tunnel through which to lay water pipes for the purposes of conveying water, to lay tracks upon which to run and operate trains, trams cars and other appliances for use in connection with the carriage of ore through the tunnel and for any other purposes in connection with the mining and milling of ores taken from an Alaska-Juneau mine. In 1968, Alaska-Juneau merged with other interests to become AJ Industries, Inc. On January 3, 1974, AJ Industries purportedly conveyed its limited interest "if any" in Tunnel No. 3 to Alaska Electric Light and Power Company ("A.E.L.P.") by a statutory quitclaim deed. Although the easement did not allow for the storage of water in the tunnel, A.E.L.P. nonetheless, attempted to enlarge on the easement rights, and purportedly conveyed a permanent easement for the transmission and storage of water in Tunnel No. 3 to the City on June 18, 1974. The City did not verify that A.E.L.P. had the property interest that it purportedly conveyed the right to store water.

Raymond M. O'Keefe, former Chairman of the Board and Chief Executive Officer of AJ Industries, Inc. from February 1974 to 1990, testified that the deed from AJ Industries to A.E.L.P. gave no interest in Tunnel No. 3

because AJ Industries had abandoned this easement during the 1940s when AJ Industries stopped transporting ore through Tunnel No. 3. Furthermore, Mr. O'Keefe could find no document after reviewing the records of AJ Industries that would give A.E.L.P. the right to grant the described easement to the City. Mr. O'Keefe concluded:

> As a businessman who has dealt extensively in land transactions, I am astounded that the interest conveyed by this Quit Claim deed [AJ Industries to A.E.L.P.] was later reconveyed to the City and Borough of Juneau without either the A.E.L.&P. or the city doing a title search for the interest in the property allegedly conveyed. Anyone who generally deals in land transactions would know that Quit Claim deeds are of very minimal value if the conveyor of the property has no legal interest in the property.

It is undisputed that there was no property right to create a reservoir as AJ did not have that right by the 1913 easement and thus could not convey same to AEL&P and subsequently to the City. The Alaska Court determined that the City had no obligation to conduct a title search that would have revealed the true facts and therefore Petitioners could not establish bad faith. If there was bad faith, there would be no inverse condemnation, and Petitioners would still have an action for trespass upon acquiring the tunnel property. However, there is convincing evidence that the City knew of the 1913 agreement and the limited easement rights. In a memorandum dated September 19, 1972 from a City Planner to the City Manager, Ronald L. Usher, re: AJ properties to obtain for water reserve and future water requirements and a June 21, 1973 memorandum to the City attorney where there is reference to a title report establishes the City's knowledge of the lack of property rights to convey an easement for a water reservoir by AEL&P.

Furthermore, the City and AEL&P entered into a unitization agreement on March 14, 1975 for joint profit of

lease or sale of property including Tunnel Number Three. Accordingly, the City and AEL&P are joint partners when and if the tunnel becomes available for profitable disposal. That may be why the City never exercised its eminent domain powers.

The City now uses Tunnel No. 3 as a water reservoir.

Mr. Keen informed the City in 1982 that it was trespassing on his property.

In early 1985, Mr. Keen sent a friendly offer to settle in favor of owner the illegal use of owner's tunnel by the City.

The trade contemplated was that the City would obtain water rights to the tunnel in exchange for certain concessions and land to Alaska Trams to allow the tramway project to go forward.

Pursuant to discussions on April 22, 1985, and Mr. Keen's earlier friendly offer, Ordinance No. 85-41 was proposed on May 20, 1985. This ordinance granted Alaska Trams an easement for a road to its mining claims on Mount Roberts; conveyed air rights; and removed the repurchase clause on earlier-acquired property. In consideration for the above, Mr. Keen agreed to grant to the City "in perpetuity an unrestricted easement to use water from Tunnel No. 3 as it exists as a C.B.J. reservoir."

Ordinance No. 85-41 was resubmitted as Ordinance 85-53 in June 1985. The City Manager and Attorney recommended that the ordinance not be passed, and that an appraisal be done on any claims regarding the tunnel before Assembly action. Despite these concerns and criticisms of the City Manager and Attorney, the Assembly on July 1, 1985, in a 7-1 vote passed Ordinance No. 85-53(am). It is clear on its face that Ordinance No. 85-53(am) was a contract between Alaska Trams and the City to resolve the tunnel dispute and allow the tramway to be built. The Alaska Superior Court, in ruling on the motions in this case, found that a contract had

been formed between the City and Petitioners. The ordinance was a "settlement" in which, in consideration for Alaska Trams giving an "easement in perpetuity" to the City to continue its use of Tunnel No. 3, the City conveyed certain real property and aerial rights to Alaska Trams.

Alaska Trams and Mr. Keen, believing they had a contract, hauled equipment, including two tractors, by helicopter to the top of Mt. Juneau, built a work camp and leveled the top of the mountain with written permission of the City in order to build a tram as a tourist attraction.

Due to litigation with A.E.L.&P. over aerial rights for one of the initial tram routes, Alaska Trams was forced to temporarily seek Chapter 11 bankruptcy protection and then fend off an attempt to convert to Chapter 7 by one of Alaska Trams rivals. When Alaska Trams sought Chapter 11 bankruptcy protection, the City seized on this as an opportunity to undermine the contract, which had resolved the tunnel dispute conveying property rights as just compensation.

By January 13, 1986, the City Attorney's Office started recharacterizing Ordinance No. 85-53(am) to be "a very narrow ordinance having the limited purpose of providing the manager with authorization to settle Mr. Keen's claim against the City concerning Water Tunnel No. 3. The ordinance concerns Mr. Keen's "Tram Project" only incidentally."

An indication that the City might back out of the agreement by changing it from a mandatory requirement to a permissive requirement is reflected in a letter from City Manager Kevin Ritchie dated October 13, 1986, in which he stated, "You must provide this stamped survey to the city manager's office before the City and Borough of Juneau may consider any land conveyances and exchange." (Emphasis added). Mr. Kevin Ritchie, shortly thereafter, stated that the required survey should be delayed pending formal direction from the Assembly/Lands Committee: "This will keep you from potentially wasting money if the basin development is

later judged inconsistent with planning and zoning standards." Mr. Keen was concerned that the City would renege.

In a November 4, 1986, meeting of the Land Committee, an assemblyman suggested a comprehensive solution to the water tunnel problem and moved to recommend that the Manager hire an appraiser for the tunnel, and that the parties agree on the appraiser. On that same date, Sarah Felix of the City Attorney's Office in an attempt/plan to repudiate the contract, drafted a memorandum to Barbara Blasco, stating:

> Ordinance 85-53am is not an express contract. The ordinance does not create an implied contract. Ordinance 85-53am does not give rise to an equitable estoppel claim. The ordinance is instead an authorization for the manager to negotiate a settlement of a claim against the municipality and authorizes the manager to exchange certain municipal property for Water Tunnel No. 3.

On January 2, 1987, Mr. Walsh wrote a memo to the Assembly Lands Committee that "Ordinance 85-53(am) was adopted in 1985 in an effort to resolve the tunnel dispute."

Unbeknownst to Petitioners, on April 10, 1987 Barbara Blasco, City Attorney, drafted a memorandum to file re: Ordinance No. 87-34: Proposed Tunnel No. 3 Settlement. She assumed that the outcome of an appraisal would be that Keen's interest in the tunnel would be worth zero. She then made the following assumption/predictions as to the City's activities upon "discovering" the true value of Mr. Keen's claims:

b. Based on new information, must reevaluate ordinance.
c. Taxpayers' claim is now FAR STRONGER
d. Keen's position now FAR WEAKER
e. What Keen proposed to give us worth

nothing; what we proposed to give him worth lots

f. Can't do this; can't compromise a valueless claim this way

g. Now we know: can't give it, but can sell it at FMV with discount (not much); Keen has repeatedly offered to buy; throw in tunnel because it isn't worth anything [Emphasis in original]

She then went on to discuss "Keen as Liability":

a. Far less of a concern than taxpayer suit liability

b. Keen needs what the City has got: Land that can be used for tram

c. Needs the City as a friend

d. Damages nominal or less for both trespass and condemnation or inverse; have not "breached a contract" [Emphasis in original]

A mining appraiser by the name of Robert Paschall was located by May 14, 1987, and had agreed to perform an appraisal for approximately $8,000 plus costs. On May 15, 1987, Sarah Felix noted that a preliminary estimate of the value of the tunnel at $320 per foot, multiplied by 850 feet, provided an approximate value of $281,000 for the part of the tunnel that ran under Alaska Trams' two mining claims.

On June 17, 1987, Sarah Felix received a call from hand-picked appraisal "expert" Robert Paschall, who determined that the value of the mining claim was zero.[1] Mr. Walsh testified that the "zero" appraisal killed his plan.

[1]Following this conversation, Sarah Felix was asked by Ms. Blasco to review her research on "breach of promise, Alaska cases on estoppel, McQuillan on compromising claims, and the eminent domain statutes in 1983 in land use cases.

Further amendments were made to a plan prepared by Murray Walsh that was to be incorporated in a new Ordinance 87-34 in an illegal, closed-door meeting. These amendments had the effect of abrogating the settlement. Ms. Blasco testified that these amendments changed the deal set out in Ordinance 85-53(am).

Notwithstanding the City's breach of its contract, Mr. Keen continued to try and build a tramway. As a result of the passage of Ordinance No. 88-03 and Ordinance No. 88-60 on October 23, 1988, a cashier's check in the amount of $52,809.19 for a building permit plus other fees was given to the City as required by the City. Jim Michael Keen borrowed the money and bought the permits in the name of Mount Juneau Enterprise, on a Mount Juneau check.

The exchange for good and clear title to all city-owned property in Ordinance No. 88-03(am) and 88-60 was not finally completed until mid-July of 1989 by a payment of $80,700 for the property and $4,811.96 for past taxes due.

Mr. Walsh had promised Petitioners a 24-foot easement widening to 100 feet up the mountain. The City could not show good title to two pieces of property, and therefore, appellants expended funds for additional non-City owned property. Until the completion of the land exchange, the City would also not permit the Petitioners to conduct the work required to keep the building permit active. Petitioners started work clearing non-City owned land on South Franklin under a site grading permit, but were unable to continue when the City refused permission to cross City-owned land.

On August 20, 1990, Mr. Keen indicated he would substitute sheet piling because of theft problems and that Trucano Construction was going to help him drive the sheet piling. The City told Mr. Keen he had until October 18, 1990, to complete the retaining wall.

On October 29, 1990, the City and Mr. Keen entered into a good faith agreement resolving the issue of the lower retaining wall and giving Petitioners until April 30, 1991, to

complete the lower retaining wall.

On October 30, 1990, Kevin Ritchie issued a memo stating, "Chuck Keen and Alaska Trams have apparently substantially met all C.B.J. requirements to protect downhill property owners and the public on the South Franklin worksite."

However, almost six weeks later, the City decided that the insurance that Mr. Keen had obtained was not adequate, and demanded on December 7, 1990, that Mr. Keen's broker acknowledge the existence of comprehensive liability insurance within four days of the date of the demand.

On December 31, 1990, Mr. Ritchie again wrote to Mr. Keen that Trucano Construction must sign an agreement satisfactory to the City to undertake and complete the retaining wall, and that Mr. Keen must provide comprehensive liability insurance, by the close of business on January 22, 1991. Mount Juneau Enterprises was noted to be the permit holder.

On January 24, 1991, Mr. Ritchie in a memorandum to the Assembly indicated that Alaska Trams did not meet the requirements detailed in the December 31, 1990, letter. He did so even though his own consultants had informed him on January 23, 1991, that the insurance coverage was adequate.

On January 25, 1991, Mr. Ritchie went on the radio and announced that Alaska Trams did not meet the requirement to resolve the issues by January 22. The interviewer then noted that the bankruptcy trustee had asked the City to wait ten days before taking any action on the permits and that "the city will extend the permits for the purpose of working with the trustee, but an extension for Mr. Keen is unlikely." The interviewer then concluded that, "[I]f Chuck Keen still hopes to develop the Mt. Juneau tram he will have to start from scratch in seeking a city building permit."

The publication of this announcement that the permits were being pulled had the effect of drying up the sources of

financing for Petitioners, and investors were told by the City that the project was canceled.

On February 4, 1991, John Rice, the attorney for Mount Juneau Enterprises, informed Trustee Zerbetz that Mount Juneau Enterprises had paid for the building permits and was the sole owner of those permits.

Despite the knowledge that Alaska Trams was not the owner of the building permits, on February 15, 1991, George Lyle, bankruptcy counsel for the City, wrote to the trustee asking on behalf of the City to turn over $27,000 to the estate as a refund if the trustee notified the City that the "project is canceled for reasons out of the permit applicant's control." Ms. Blasco recognized that the automatic stay provisions applied to actions involving a debtor in bankruptcy court. No condemnation proceedings had ever been done as to the tunnel owned by Alaska Trams. Permission of the Court would have to be granted for relief from stay before condemnation proceedings could apply. Ms. Blasco preferred to make the entire tunnel litigation just go away through the trustee. Thus, Ms. Blasco and Mr. Lyle conspired to find a method to end the dispute over the tunnel litigation and cancellation of permits without going through bankruptcy court.

In fact, the bankruptcy trustee never canceled the tramway project and never requested that the permits be pulled. On March 6, 1991, Mr. Keen wrote to Mr. Ritchie confirming that the bankruptcy trustee had not canceled the project, and reiterating that the permits were owned by Mount Juneau Enterprises. Mr. Ritchie wrote back, stating that the trustee for the Alaska Trams estate had notified the City that the project was canceled. Mr. Ritchie stated that the unused balance of the project would be refunded to the estate, and that Mr. Keen would have to apply for a new building permit to restore the lower tram site to a safe condition.

By the time of the March 6, 1991 letter, the City was aware of the fact that the claim of A.E.L.P., which was the major creditor in the bankruptcy of Alaska Trams, had been settled and that Alaska Trams had moved to dismiss Alaska

Trams from bankruptcy, which motion was pending at that time. This letter which was written by Ms. Blasco was sent despite the City's knowledge of the motion to dismiss.

Following the permit cancellation, an emergency hearing was held before the Honorable Herbert Ross, Bankruptcy Judge, on Mount Juneau Enterprises' motion to enjoin the trustee from taking any action in regard to the building permits. Judge Ross held that inasmuch as the permits belong to Mount Juneau Enterprises, the trustee could take no action against them. Inasmuch as they belong to Alaska Trams, the trustee would have to notice out any attempt to abandon them. Insofar as the property might belong to Alaska Trams, the City's action "was a violation of the automatic stay. The City might have shot itself in the foot, possibly subject themselves to sanctions by taking an action against estate property." The judge also stated to Mr. Keen:

> I'll tell you, this, I'm saying this not really facetiously, but the hope of recovering the case might have just been improved ... if the City has violated the automatic stay in a way that really caused an injury to the project. (Exc. 179)

The City would not be able to take any adverse action against the permits without moving for release from the automatic stay provisions of the Bankruptcy Code. The Bankruptcy Judge also noted that the City had engaged in obvious maneuvering to create obstacles on the building permits to obtain a technical advantage in the tunnel litigation: "I know that they have experienced bankruptcy counsel working in relationship to this Mt. Juneau waterway, tunnel project and that the mechanics or the maneuvering is underlying all this, probably."

On March 11, 1991, Mr. Ritchie wrote to Mr. Keen that the City would not consider the building permits as having been canceled by the trustee at this time. However, Mr. Keen sent several letters to the City inquiring as to the status of his permits, as financing had been canceled due to

the news stories and comments by the City that the permits had been pulled. On March 22, 1991, Mr. Ritchie wrote to Mr. Keen, maintaining his position that the status of the permits was still in "limbo." On April 3, 1991, Mr. Ritchie again wrote to Mr. Keen that the permits were still valid. On April 5, 1991, Mr. Ritchie wrote that the permit conditions were still in effect except that the April 30, 1991, deadline was amended to May 31, 1991. However, Petitioners were unable to work without written permission of the trustee, at least according to the City. On May 8, 1991, Alaska Trams was discharged from bankruptcy. That left only 23 days for the deadline. By that point, Mr. Trucano had already removed his heavy equipment and was in Haines, Alaska, and Mr. Keen asked for a six-month extension to obtain new financing and the equipment to complete the retaining wall, but the City refused. (Exc. 197)

The Petitioners commenced this instant lawsuit in early June 1991. Following the commencement of the lawsuit, the permits were officially cancelled.

VIII. REASONS FOR GRANTING CERTIORARI.

A. It Is Fundamentally Unfair And A Violation Of Basic Due Process For Private Property To Be Taken Through A Fraudulent Conveyance To A Governmental Entity To Avoid Paying Just Compensation

Under Article 1, Section 18 of the Alaska Constitution, private property shall not be taken without just compensation. In conjunction with the constitutional provisions, the State of Alaska has enacted a comprehensive statutory scheme for municipalities in applying eminent domain. See AS 09.55.240 et seq. and AS 29.35.030. It is undisputed that the City never utilized the eminent domain statute.

State, Department of Highways v. Crosby, 410 P.2d 724, 728-729 (Alaska 1966) held that even though the State had not utilized condemnation proceedings prescribed by law

and by rule, it had exercised the power of eminent domain constituting an inverse condemnation when the "State mistakenly, but in good faith" believed it had the right to rely upon reservation of a right-of-way for highway purposes contained in a patent.

The Fifth amendment to the United States Constitution requires that the federal government take private property only for public uses and only upon the payment of just compensation. The just compensation clause has been interpreted as part of the concept of due process under the Fourteenth amendment. Webb's Fabulous Pharmacies Inc. v. Beckwith, 449 U.S. 155, 159 (1980). Furthermore, Article 1, Section 18 also mandates just compensation for a governmental taking.

In this case, the City knew that the AEL&P did not have property interest to convey the tunnel for storage of water. The City had received title reports that showed AEL&P's lack of conveyable interest and did not do a title report upon AEL&P's bogus conveyance. Therefore, the City did not act in good faith.

Therefore, Petitioner's property interest through an option entitled them to just compensation for the taking of the tunnel. The City did not condemn the property. Upon the purchase of the tunnel by Petitioners in 1982, they obtained complete legal title and the City was a mere trespasser. As a matter of constitutional law, Petitioners have property rights that cannot be extinguished without just compensation.

B. It Is Fundamentally Unfair And A Violation Of Due Process For A Governmental Entity To Abrogate A Contract And Therefore Extinguish Property Rights Without Just Compensation.

A proposition or offer made to municipal authorities "and an acceptance of the terms of it by an ordinance, resolution or motion constitutes a contract." 10 McQuillan, The Law of Municipal Corporations (3rd Ed. 1990 Revised),Sec. 29.03. See also Williston on Contracts at 282-283 (4th Ed. 1990). Mr. Keen made an offer to settle the

tunnel dispute for certain property rights in order to build the tramway. The Assembly passed Ordinance 85-53(am) as a result. The trial court found that the language of Ordinance 85-53(am) "supports Alaska Trams' argument that it established the terms of the settlement agreement between the parties." This settlement agreement, as stated in the facts, constituted a settlement whereby Alaska Trams would settle the tunnel dispute and obtain substitute property rights as just compensation.

"An ordinance is to be construed in the light of the surrounding circumstances and conditions under which it was enacted." 6 McQuillan, The Law of Municipal Corporations (3rd Ed. 1988 Revised), Sec. 20.46. "The general rule is that ordinances should be "liberally construed" to give them the effect intended." Id. at Sec. 20.49. The trial court stated, "The City does not seriously dispute that the Ordinance established certain rights and duties in the parties."

The Alaska Supreme Court has simply skirted the constitutional issues by determining there was no enforceable contract through enactment of Ordinance 85-53am "because it requires future legislative action . . . it would require the Assembly to agree in advance to authorize the exchange of unspecified parcels of land in the future" (Opinion at p. 19). Under its own terms Ordinance 85-53am is a settlement "GRANTING" and "CONVEYING" specific property rights for Mr. Keen's grant to the City in perpetuity of an unrestricted easement to use Water Tunnel Number Three. Nothing in the title or body of Ordinance 85-53am states that the City Manager is being authorized to negotiate a settlement. Nowhere in Ordinance 85-53am is future legislative action required. The contract is enforceable. Sections 3(b) and (c) of the Ordinance conveyed some five parcels of land and there were no conditions on the conveyance of these parcels.

A governmental entity cannot later decide that they don't like the deal they made, and then abrogate the contract. In effect the voiding of a contract constitutes the exercise of eminent domain resulting in a taking without just compensation. The power of eminent domain extends to

tangibles and intangibles, including contracts, City of Cincinnati v. Louisville & Nashville R. Co., 223 U.S. 390, 400 (1912).

C. It Is Fundamentally Unfair And A Violation Of Due Process To Destroy The Value Of A Building Permit By Impeding The Ability Of The Permit Holder To Effectively Use The Permit And Such Government Action Amounts To Taking Without Just Compensation.

Mount Juneau paid over $50,000 for the building permits needed for the tramway project. A license for which a substantial sum has been paid constitutes property. McQuillan, The Law of Municipal Corporations (3rd Ed. Revised 1986) at Sec. 26.01a. The Petitioners also spent tens of thousands of dollars in clearing the land, conducting surveys and geotec soil studies, in engineering time and in purchase of private property. This is an investment of a substantial sum of money. Where a license has been purchased for a "substantial sum" of money, "work done, obligations incurred, expenditures made," vested property rights arise. Id. at Sec. 26.14. Furthermore, on October 29, 1990, the City through its agents, Mr. Ritchie, Ms. Blasco and Mr. Roust, signed an agreement with Mr. Keen that the building permits would not be yanked, and that Petitioners would have until April 30, 1991, to complete the retaining wall on the property.

The City saw a window of opportunity while Alaska Trams was in Chapter 7, to evade due process and gain tactical advantage in the "Tunnel Litigation" by the simple expediency of having the trustee cancel the permits so as to deal a final death blow to Alaska Trams and then kill its ability to continue to litigate the tunnel claim. The bankruptcy court ultimately determined that the permits were a valuable asset that couldn't be abandoned or sold off without notice, and rejected the attempted cancellation by the City in cahoots with the trustee and trustee's attorney. Furthermore, the City was aware of the interest that Mount Juneau had in the permits, and that Mount Juneau had filled out the application form for

the permits, that Mount Juneau had paid for the permits, and in various communications from the City , the City was aware that Mount Juneau had an interest in these building permits. Yet the City still attempted to have the trustee liquidate these permits, irrespective of the interest of Mount Juneau.

The actions by the City undercut the ability of Petitioners to comply with the October 29, 1990, agreement in other ways, including (1) Mr. Ritchie informing Mr. Trucano basically that he was proceeding at his own risk due to the Chapter 7 bankruptcy; (2) going on the radio on January 25, 1991, and basically informing the public that the permits were dead; (3) Mr. Ritchie, in a letter of March 6, 1991 written by Ms. Blasco, pulling the permits, even though the City was informed by appellants' counsel that Mount Juneau was the permit holder, that the bankruptcy court would have to decide the status of the permits, and despite the knowledge that Alaska Trams had moved to dismiss the bankruptcy. These actions prevented Petitioners from completing the retaining wall each time the City was notified that Petitioners were ready to do the necessary work.

The City again and again undercut the financial backing of the appellants and though the Petitioners requested an additional six-month extension of time so that they could obtain the new financing following the dissipation of the previous financial backing and also get a contractor to come back on the property to build a retaining wall, the City refused. (Note that the retaining wall which the City was so intent on using as a sword against Petitioners was always a bogus issue. Mr. Ritchie has acknowledged that there has been no slide from the property and in fact the City, though pressing Petitioners constantly to build the retaining wall, over a year later was saying it wasn't even necessary to build said retaining wall.)

The City continuously thereafter sought to pull the permit to obtain an advantage in the tunnel litigation which is improper and violates the obligation of good faith in regard to the permits and the agreement. The actions of the City impaired the use of the building permits. Non-acquisitive

governmental action may amount to a taking in a constitutional sense. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); United States v. Causby 328 U.S. 256 (1946); Lenoir v. Porters Creek Watershed District, 586 F.2d 1081, 1093 (6th Cir. 1978). Overregulation of property can also result in a taking. Rotunda & Nowak, Treatise on Constitutional Law: Substance and Procedure, 2nd § 15.12. The impediments to the building permit by the City constitutes a taking for which just compensation is due.

IX. SUMMARY AND CONCLUSIONS

The Bill of Rights (Amendments to the United States Constitution) and the Declaration of Rights (Article I to the Alaska constitution) are an enumeration of rights possessed by the people of the United States and the State of Alaska, respectively. These rights are recognition of the danger engendered by an unfettered government against its own people. The Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 18 of the Alaska Constitution protect the due process property rights of the citizens of the United States and Alaska against their own government taking property without just compensation.

The Petitioners herein were deprived of their property without just compensation by the City. The abuse of governmental power is reflected in the fraudulent conveyance of property interests not possessed by AEL&P to the City so that the City would not exercise the eminent domain statutes to condemn property and thus have to pay just compensation; abrogating a contract with Petitioners extinguishing property rights resulting from the contract without just compensation; and impeding a building permit resulting in constructively depriving Petitioners of their vested property rights in the building permit, thereby depriving Petitioners of property without just compensation.

Unless this Court accepts Petitioners case, this manifestly unjust, illegal abuse of governmental power and the deprivation of private property rights without just compensation, will remain unremedied. It is a challenge to the

fundamental due process rights of all Americans. Therefore, Petitioners respectfully ask that the Court grant certiorari and rule that with no good faith by the City as to its quit claim deed, it must institute formal condemnation proceedings with full due process rights and allow suit to go forward as to the damages for the breach of contract as to the tram ordinance and as to the building permits..

Respectfully submitted this 18th day of February, 1997.

Phillip Paul Weidner
Counsel for Petitioner

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

MOUNT JUNEAU ENTERPRISES, INC.,
ALASKA TRAMS, INC., ARNT I. ANTONSEN,
CHARLES KEEN AND KAREN KEEN
Petitioners,

v.

THE CITY AND BOROUGH OF JUNEAU
(a municipal corporation), et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

WEIDNER & ASSOCIATES, INC.
Attorneys for Petitioners

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48 pp

TABLE OF CONTENTS

Document	Docket No.	Page No.
The Supreme Court for the State of Alaska in Mount Juneau Enterprises Order Denying Rehearing dated November 20, 1996	N/A	1
The Supreme Court for the State of Alaska in Mount Juneau Enterprises Memorandum and Opinion of September 6, 1996	N/A	2
Superior Court for the State of Alaska in Mount Juneau Enterprises Decision on Motions of January 31, 1994	N/A	22

IN THE SUPREME COURT FOR THE STATE OF ALASKA

MOUNT JUNEAU ENTERPRISES, INC., ALASKA TRAMS, INC., ARNT I. ANTONSEN, CHARLES KEEN and KAREN KEEN, Plaintiffs/Appellants, vs. THE CITY AND BOROUGH OF JUNEAU (a municipal corporation), et al., Defendants/Appellees.	) Supreme Court) No. S6611

Trial Court No. 1KE-91-642 CI

ORDER

IT IS ORDERED;

The petition for rehearing, filed on November 6, 1996, is DENIED. Entered by direction of the Alaska Supreme Court [Eastaugh, and Fabe. Justices, not participating].

SC #1KE-91-642 CI cc; Justices. Judge Zervcs. TD Appeals Clerk/Juneau. Publishers (West Publishing and Mead). Opinion #4396 - September 6, 1996.

Dated this 20 day of November, 1996.

Clerk of the Appellate Courts

IN THE SUPREME COURT OF THE STATE OF ALASKA

MOUNT JUNEAU ENTERPRISES, INC., ALASKA TRAMS, INC., ARNT I. ANTONSEN, CHARLES D. KEEN, and KAREN KEEN,	) Supreme Court) No. S-6611
Appellants,	
v.	) Superior Court) No.) 1KE-91-642CI
THE CITY AND BOROUGH OF JUNEAU (a municipal corporation), BRUCE BOTHELHO, CAREN ROBINSON, ROSALEE T. WALKER, KIM S. ELTON, DENNIS W. EGAN, ROSIE PETERSON ERROL CHAMPION, GEORGE DAVIDSON, JOHN MacKINNON, DEVIN RITCHIE, BARBARA BLASCO, and MURRAY WALSH,	) OPINION) [No.4396 -) Sept. 6, 1996]
Appellees.	

Appeal from the Superior Court of the State of Alaska, First Judicial District, Ketchikan, Larry c. Zervos, Judge.

Appearances: Phillip Paul Weidner, Weidner & Associates, Inc., Anchorage, for Appellants. Avrum M. Gross and Susan A. Burke, Gross & Burke, Juneau, for Appellees.

Before: Rabinowitz, Matthews, and Compton, Justices. [Moore, Chief Justice, and Eastaugh, Justice, not participating.]

RABINOWITZ, Justice.

I. INTRODUCTION

This appeal involves an interwoven property right and contractual dispute surrounding a failed attempt by Charles Keen to construct a tram to the top of Mount Juneau.

II. FACTS AND PROCEEDINGS

There are two separate sets of facts underlying the issues of this appeal, those relating to the tunnel claim and those relating to the tram claims.

A. The Tunnel Claim

In 1913, the Alaska Juneau Gold Mining Company (AJ) obtained an easement to construct and maintain a tunnel underneath the Red Jacket and White Wing mining claims. The easement granted AJ, "its successors and assigns forever, the right to drive, construct and maintain" a 9' by 14' tunnel under the Red Jacket and White Wing mining claims to enable the AJ "to construct and perpetually maintain a transit tunnel in and through which to lay water pipes, flumes and other conduits for the purpose of conveying water..."The tunnel connected the two already existing ends of what is known as "Tunnel No. 3."

On January 3, 1974, AJ Industries conveyed its rights in the tunnel to the Alaska Electric Light & Power Company (AEL&P) by a statutory quitclaim deed. That June, AEL&P granted the City and Borough of Juneau (City) a permanent easement specifically authorizing the City to use the tunnel for "the transmission and storage of water." From September 1977 to April 1979, contractors for the City worked to convert the tunnel into a public water reservoir. The entire project was accepted as complete on November 1, 1979; however, additional work continued until May 1982.

Sometime in 1972, Charles Keen became interested in purchasing the Red Jacket and White Wing mining claims overlying the tunnel. He contacted Leonard Idso, who was paying taxes on the property at the time, and apparently obtained an option to purchase the property. The

first record of Keen's interest in the property is an earnest money agreement, dated October 5, 1981, between Keen and Idso for the sale of property including the Red Jacket and White Wing mining claims. The agreement provides that the purchase price for the two mining claims, as well as a third mining claim, was $10,000. The agreement also states that the real property was to be conveyed subject to "easements of record." A statutory warranty deed from Idso to Charles and Karen Keen for the three mining claims was executed on October 16, 1981, and on October 22, 1981, the Keens quitclaimed their interest to Alaska Trams, Inc.

Keen testified in his deposition that he first learned of the City's use of the tunnel either just prior to or immediately after his purchase.[1] Keen testified that, at some time after the purchase, he and his wife saw a map at the municipal building showing the City's use of the tunnel. He advised the City that a mistake had been made and thereafter took the position that the City was trespassing on his property.

B. The Tram Claims

In 1976, the City became involved in Keen's plans to build a tram to the top of Mount Juneau. The first plan called for a tramway from a base terminal on South Franklin Street to the top of Mount Juneau with a mid-point tower on Gastineau Ridge. The City leased a piece of land on Gastineau Ridge to Alaska Trams for the mid-point tower and issued a conditional use permit that would allow the construction. In 1978, the City sold Keen some land on South Franklin Street to be used for the base terminal. The deed of sale contained a reversion clause providing that the City could repurchase the land if it was not used to develop the tram within four years. The deadline, however, was extended several times. In 1984, the City modified its procedures and

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[1] In the late 70s, Keen learned that the City was converting a tunnel into a water reservoir. He claimed that he contacted City officials but was assured that the tunnel being converted was not the same tunnel he was interested in purchasing.

required contractors with conditional use permits to secure building permits and begin construction within 18 months. Keen applied for a new permit, set to expire in February 1986, based on the same plan outlined in 1976.

On February 25, 1985, Keen offered to waive all of his potential tunnel claims against the City if the City would deed him the property he already owned on South Franklin Street free of the reversion clause, deed him the land owned by the City on Gastineau Ridge and at that time leased to Keen for the mid-point towers, grant him certain air rights over City property, and "road deed access and parking space . . . over City property" to his mining claims. After an initial ordinance reflecting similar terms, Ordinance No. 85-53am, was introduced and passed. The provision required Keen to submit surveys describing the as yet unspecified location, extent and scope of the easements for the road and the parking lot "at a location and size to be approved by staff in accordance with existing planning and zoning standards."

At the time Ordinance 85-53am was adopted, Keen's conditional use permit authorized the placement of mid-point towers on Gastineau Ridge. However, Keen then decided to change the plans for the tram due to a dispute over air rights. Instead of having the tram begin on South Franklin Street, the new plan located the base of the tram on one of Keen's mining claims in Gold Creek Basin. In August of 1985, the City apparently concluded that the new plan would have to be evaluated by the Planning Commission and that Keen would have to proceed through the conditional use permit procedure. Keen's representative was subsequently informed that the new plan would require a zoning change and a new conditional use permit.

In late 1986, the City Manager requested Keen to provide the survey required under Ordinance 85-53am. Specifically, he noted that the granting of an easement "for a road and parking lot over city and borough property connecting Red Jacket, White Wing, and Black Diamond mining claims to the nearest existing road" was conditioned on Keen "providing the manager with a stamped survey, describing the location, scope and extent of the easement at a

location and size to be approved by staff in accordance with existing planning and zoning standards."

Keen eventually applied for a zoning change for the land near his mining claims. However, because of numerous problems identified with that plan, Keen and the City agreed to come up with an alternative plan. Under the alternative plan, the base terminal would be located on South Franklin Street as envisioned by the original plan, but it would be located on City land to avoid any dispute over air rights. The City issued a new conditional use permit for this plan in April of 1987.

Keen's representatives and the City worked to prepare Ordinance No. 87-30 which provided for the conveyance of City land on South Franklin Street to Keen in exchange for Keen's release of his tunnel trespass claims against the City. The ordinance was hotly debated at the Assembly meeting on May 4, 1987, and it ran into heavy public opposition due in part to the lack of an appraisal value for the tunnel claim. The ordinance was defeated 3 vote of the Assembly.

In the meantime, several events of importance were taking place. First, in mid-1986, Alaska Trams filed for Chapter 11 bankruptcy. Second, City attorneys interpreted Ordinance No. 85-53am simply as an ordinance designed to settle the tunnel claims by authorizing the City Manager to negotiate a settlement and to transfer City land as part of the deal. Keen, on the other hand, had always contended that the ordinance was a binding contract. Third, City attorneys and some City assembly members were concerned that Keen's tunnel claim was worthless and an appraisal was eventually ordered to value the claim.

Keen's representatives and the City subsequently began to work on Ordinance No. 87-34 to address the problems which led to the defeat of Ordinance No. 87-30. The appraisal, received prior to the Assembly's final action on Ordinance No. 87-34, concluded that the tunnel claim was valueless. Thus, the Assembly directed City staff to remove certain reversion and repurchase provisions in

Ordinance No. 87-34 and to provide for the sale of City land at fair market value subject to a discount to reflect the litigation value of Keen's claim. This version of the ordinance was passed by the Assembly.

Keen did not support this ordinance and refused to negotiate a credit for settling the tunnel claim. Keen approached the City and requested that the land transfer be separated from the issues surrounding the tunnel claim. The Assembly then passed Ordinance No. 88-03 which authorized conveyance of the property to Alaska Trams for an established price without requiring him to compromise the tunnel claim. The ordinance also required Keen to undertake certain actions before obtaining title to the property, including providing necessary surveys. These conditions were to be met by December 5, 1988, but due to delays, the land transfer was not completed until July 12, 1989.

In the meantime, the 1987 conditional use permit was set to expire in October of 1988. Prior to the expiration, Keen applied for and was granted a "fast track authorization" permit (FTA) that would allow him to build the project in phases. The permit required the work to commence by April 28, 1989, and that "construction activity shall continue without interruption until all work of the lower and mid terminal lower tram is accomplished."

No work was commenced prior to "April 28, 1989 and the starting date was extended until October 9, 1989. Work commenced prior to that date and continued sporadically until the spring of 1990. On October 29, 1990, Keen and City staff agreed to the conditions under which the FTA would be continued in force even though Keen's work on the project had stopped. Specifically, Keen agreed to provide insurance to cover damages to adjoining landowners and to provide a written guarantee from a reputable contractor that if Keen did not complete the lower retaining wall by April 30, 1991, the contractor would do so. Keen failed to deliver the insurance and guarantee, and the City set a January 22, 1991 deadline for Keen's performance of the agreement.

At about this time, the Alaska Trams bankruptcy was converted into an involuntary Chapter 7 proceeding, and the City began to deal with the bankruptcy trustee. The City extended the insurance coverage and building commitment deadline until February 1, 1991 at the request of the bankruptcy trustee. The insurance was then finally posted and a contractor signed an agreement to complete the work if Keen failed to complete it. However, the contractor's guarantee was conditioned on Mount Juneau Enterprises' retaining the building permits.

On January 25, 1991, the City Manager, Kevin Ritchie, was interviewed by a radio reporter. Ritchie stated that he could not think of a good reason to extend the permit past its last expiration date for Keen, but that the City would cooperate with the bankruptcy trustee. The City and the bankruptcy trustee began to discuss the status of the permit. The City informed the trustee that if the project was cancelled for reasons beyond Alaska Trams' control, the City would be able to refund 527,000 of the unexpended building permit fees to the bankruptcy estate. The trustee subsequently informed the City that the project was cancelled.

Mount Juneau Enterprises immediately objected to the cancellation, and filed a motion before the bankruptcy court seeking to enjoin the trustee from canceling the project. A hearing was held on March 8, 1991. The bankruptcy judge refused to enter an order, but ruled that the trustee had not effectively cancelled the project, and that the proper procedure to follow for cancellation of the project was to move for abandonment.

Immediately after the hearing, the City Manager wrote to Keen and the Assembly advising them of the judge's ruling and stating that the City would determine whether all the conditions of the building permit had been satisfactorily met. He invited Keen to meet with him and discuss the matter. A meeting was held.[2]

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[2] The meeting was apparently very difficult. Keen believed that Ritchie's statements to a radio reporter and newspaper had effectively ended his hopes

The city agreed to confirm in writing that the permit was valid, and extended the time period within which Keen was to complete the retaining wall until May 31, 1991.

However, Keen did not comply with the new deadline, and on June 23, 1991, he filed this suit against the City. Counts 1 through 5 of Mount Juneau Enterprises' complaint concerned the tunnel claim and included a claim for damages for trespass. Counts 6 through 13 concerned the tram claims and included claims for damages for breach of contract and fraud. The City subsequently informed Keen that the permit had expired.

After extensive discovery, both parties moved for summary judgment. Following oral argument, the superior court concluded that there were no issues of material fact concerning any of the claims and entered final judgment in favor of the City. Mount Juneau Enterprises appeals.

III. STANDARD OF REVIEW

This is an appeal from the superior court's grant of summary judgment in favor of the City. In reviewing a grant of summary judgment, this court applies a de novo standard of review and determines whether there are any genuine issues of material fact, and whether the moving party is entitled to judgment on the law applicable to the established facts. Farmer v. State, 788 P.2d 43, 46 n.8 (Alaska 1990); Zeman v. Lufthansa German Airlines, 699 P.2d 1274, 1280 (Alaska 1985).

Mount Juneau Enterprises also appeals the superior court's denial of a motion to continue discovery under civil Rule 56(f). This court reviews a trial court's decision on whether to permit further discovery under Civil

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for financing and caused great injury to the tram project. Keen apparently stated that he would not attempt to resolve the matter unless the City took out a full page newspaper ad apologizing to him. No such ad, however, was ever run by the City.

Rule 56(f) for an abuse of discretion. Munn v. Bristol Bay Housing Auth., 777 P.2d 188, 192 (Alaska 1989).

IV. DISCUSSION

A. The Tunnel Claim

The superior court concluded that the City had acquired title to the tunnel through inverse condemnation, that the condemnation had occurred before Keen obtained any interest in the tunnel and, accordingly, denied Keen's clams for damages for trespass or condemnation for a taking of property. On appeal, Keen argues that the superior court erred in determining that the City had inversely condemned the tunnel. Keen also argues that, even if the City had inversely condemned the tunnel, he has a right to compensation by virtue of his option to purchase.

1. TresDass Damages

Subsections (4) and (5) of AS 09.55.240(a) provide that municipalities may use the power of eminent domain to condemn "sites for reservoirs necessary for collecting and storing water." An inverse condemnation occurs when a governmental entity takes private property for public purposes under the good-faith but mistaken belief that the taking does not require the exercise of eminent domain. State. Department of Highways v. Crosby, 410 P.2d 724, 728-29 (Alaska 1966).

The doctrine of inverse condemnation was the basis of this court's decision in Wickwire v. City & Borough of Juneau, 557 P.2d 783 (Alaska 1976). In Wickwire, the City mistakenly placed a sewer line on Wickwire's property. Although Wickwire asserted a trespass claim, as did Mount Juneau Enterprises in this case, we concluded that the landowner's only remedy in such a case "is an inverse condemnation action for just compensation for the value of the easement on the date of taking . . . ." Id. at 784.

Keen's only argument that no inverse condemnation took place in this case is that the City's belief

that it owned an easement sufficient to construct the reservoir was not a good-faith belief since a title search would have revealed that AEL&P did not have the power to convey this interest. We do not agree that the City's reliance on AEL&P's easement is inconsistent with a good-faith but mistaken belief that there was no need to exercise eminent domain powers. Accordingly, we conclude that the City inversely condemned the tunnel sometime in the mid-1970s and that Mount Juneau Enterprises could not, therefore, be entitled to damages for trespass.

2. Compensation for Inverse Condemnation

Generally, "when there is a taking of property by eminent domain in compliance with the law, it is the owner of the property at the time of the taking who is entitled to compensation." 2 Sackman, Nichols on The Law of Eminent Domain § 5.01[4], at 5-29 (Rev. 3d ed. 1993).[3] This right is a personal one which does not pass to a subsequent purchaser unless the parties explicitly agree to that arrangement. Wickwire, 557 P.2d at 785 n.7; see also Williams v. City of Valdez, 624 P.2d 820, 821 (Alaska 198I). The agreement signed by Keen and Idso in 1981 nowhere provides for such a transfer. Since Keen was not the owner of the property on the date of the taking and did not receive any right of action against the government in his deed, he is not entitled to compensation as the owner of this easement.

For purposes of this appeal, however, we must assume that Keen had an option to purchase the claims at the time that the City commenced construction of the and we must consider the significance of this option. There is a recent trend favoring "the conclusion that the owner of an unexercised option to purchase land possesses a property right which is compensable in eminent domain ...." 2 Sackman, § 5.03[1], at 5-72 and 5-73. The leading case taking this approach is County of San Diego v. Miller, 532 P.2d 139

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[3] Wickwire defines the date of the taking as the date when the construction began. 557 P.2d at 784 n.4.

(Cal. 1975), in which the California Supreme Court held that the owner of an unexercised option to purchase land possesses a property right which is a compensable interest in a condemnation action. To this effect, the Miller court stated as follows:

> [C]ompensation issues should be decided on considerations of fairness and public policy. "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness of property law." "[T]he right to compensation is to be determined by whether the condemnation has deprived claimant of a valuable right rather than by whether his right can technically be called an 'estate' or 'interest' in the land."

Miller, 532 P.2d at 143 (citations and emphasis omitted). The court held that the measure of damages to the option is the excess, if any, of the total award above the optioned purchase price.[4] Id. at 144.

Although we agree that an option does create a compensable interest in property and that, in some cases, an option-holder may be entitled to some proceeds from an inverse condemnation action, Keen's allegations in this case

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[4] This approach has been adopted by a number of states. Texaco, Inc. v. Commissioner of transportation, 383 A.2d 1060 (Conn. 1977); Sholom, Inc. v. State Roads Comm'n, 229 A.2d 576 (Md. 1967); State v. Las Veaas Bldg. Materials, Inc., 761 P.2d 843 (Nev. 1988); Fullington v. M. Penn Phillips Co., 395 P.2d 124 (Or. 1964); In re Petitioner of Governor Mifflin Joint School Auth., 164 A.2d 221 (Pa. 1960); Spokane School Dist. No. 81 v. Parzybok, 633 P.2d 1324 (Wash. 1981).

are simply not sufficient to support such a claim. In his affidavit, Keen stated as follows:

> I can state with certainty that I purchased this option in 1971 or 1972. I do not remember the amount I paid for the option. I did not keep a copy of this option. My wife and I are not sophisticated bookkeepers and at the time I had no idea that the option agreement would become an important document. In 1981 when we exercised the option to purchase and received a warranty deed we did not believe the option agreement was necessary to keep anymore.

The fact that Keen held some kind of an option to purchase the land in question is not alone sufficient to entitle him to compensation. The proper inquiry should focus on the extent to which his option diminished in value as a result of the City's actions. In order to calculate this amount, Keen would have to introduce the terms of the option itself with adequate specificity; he has failed to do so.

Without any evidence of the terms of the option, it is impossible to determine whether the condemnation has deprived Keen of a valuable right, thus warranting compensation. See Miller, 532 P.2d at 143. If, for example, the option allowed Keen to purchase the property at a price of one dollar at any time before the year 2000, the option may have diminished in value as a result of the City's actions to nearly the full extent of the value of the taking. On the other hand, if the option was merely a right of refusal, the diminution of value would probably be negligible.

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[5] In a supporting affidavit, Robert Slatzer described the option as "a hand-written document which was an option of first refusal to purchase the

Because Mount Juneau Enterprises can neither produce the option agreement nor any evidence of its terms, it has failed to raise a material fact as to whether the condemnation deprived Keen of a valuable right.[6] See Alaska-Canadian Corn. v. Ancow Corp., 434 P.2d 534, 537-38 (Alaska 1967). Based on the foregoing, we conclude that summary judgment was appropriate as to the tunnel claim.[7]

B. The Tram Claims

1. Ordinance No. 85-53am

The superior court concluded that Ordinance No. 85-53am established certain rights and duties in the City and Alaska Trams, but that the City did not violate the terms of the ordinance. To this effect, the superior court stated:

> There is no legitimate issue in dispute on this claim. Alaska Trams was required, as a

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land on which the tunnel was located." (Emphasis added). Although he had a copy of the option in his possession, Slatzer is apparently unable to recall any of the specific terms.

[6] The City accurately summarizes the state of the evidence relating to the terms of the option as follows:

"Keen does not remember the date of the option (Keen Dep. at 951); or the terms of the option (Keen Dep. 954, 959-960); or whether he paid anything for the option (Keen Dep. at 1009). He does not remember if the option was written or verbal (Keen Dep. at 952). He does remember that he was not legally obligated to buy the property (Keen Dep. at 954) though he cannot remember whether the owners were obligated to sell. (Keen Dep. at 959-960.) At one point, he asserted it was a "first refusal option" that would entitle him to a "first refusal option" when the family got some legal matters "cleared up." Keen didn't "have a clue" what the legal matters were. (Keen Dep. at 954-55.) Keen cannot remember whether the option could be revoked or, if so, under what circumstances. (Keen Dep. at 973)."

[7] In light of this holding we need not consider the question of whether the City gained title to the easement by adverse possession.

> condition precedent to the City's performance, to provide a stamped survey showing the location and size of the easement that could be approved by City staff in accordance with planning and zoning ordinances. This was never done. . . .
>
> A new route was planned and eventually land transferred and work begun. There is no breach by the City, or by Alaska Trams for that matter concerning the new plan. The parties just agreed to do something else.

On appeal, Mount Juneau Enterprises argues that the City breached the contract embodied in Ordinance No. 85-53am.

Ordinance No. 85-53am authorized the City Manager to transfer certain City land to Keen in exchange for Keen's abandoning the tunnel claim against the City. Part of the property to be conveyed was described in Section 3(a) of the ordinance, which stated as follows:

> Section 3. Land and Easement Conveyances. In exchange for a conveyance by Chuck Keen as representative of Alaska Trams of an unrestricted easement, in perpetuity, consisting of Water Tunnel No. 3 so that the City and Borough of Juneau may continue its existing use of the tunnel as a water reservoir, the manager is authorized to convey to Chuck Keen:

> (a) an easement for a road and parking lot over city and borough property connecting Red Jacket, White Wing and Black Diamond mining claims to the nearest existing road. The grant of the easement shall be conditioned on Chuck Keen providing the manager with a stamped survey describing the location, scope and extent of the easement at a location and size to be approved by staff in accordance with existing planning and zoning standards.

Keen never provided the City with a stamped survey, and it was eventually determined that Keen was not likely to get the zoning change approved. Thus, Keen and the City agreed to come up with an alternative plan. Since Keen failed to meet the conditions for conveyance of the land in Ordinance No. 85-53am in the first place, the City's actions would not have amounted to a breach even if a contract had been formed.

Mount Juneau Enterprises argues that Ordinance No. 85-53am constituted a binding agreement that the City would transfer land to Keen in exchange for Keen's agreement to abandon the tunnel claim. Such an agreement was based on the assumption that-the tunnel claim was valuable. Thus, Mount Juneau Enterprises seems to argue that even though the original agreement had been mutually abandoned, the City was still obligated to treat Keen's tunnel claim as valuable in subsequent negotiations, and to transfer land to Keen in exchange for Keen's agreement to abandon the claim. Apparently, the City was supposed to treat the claim as valuable even after determining that it had no value.

The City cites City of Louisville v. Fiscal Court of Jefferson County, 623 S.W.2d 219 (Ky. 1981) for the proposition that a legislative body may not bind itself to

future legislative action. In that case the Supreme Court of Kentucky considered a contract allegedly resolving a dispute over annexation, where the City had agreed to limit certain future tax rates and to cooperate fully with the owners of the annexed property in applications for zoning changes. The court stated as follows:

> The law is clear that a legislative body may not limit its power to act one way or another in the future in governmental as opposed to proprietary, functions.

Id. at 224. The court then stated:

> Not only does the contract place an obligation on the city which may create conflicts of interest, but it also creates an obligation to legislate in the future. The area of zone changes, changes in street entrances, flood control, etc., are all legislative in nature. A contract which binds a legislative body, present or future, to a course of legislative action is void against public policy.

Id. at 225 (citations omitted).

The conveyance of City land can only be authorized by the Assembly. See CBJ Ordinance 53.09.200. Thus, even if Ordinance No. 85-53am constituted a contract providing that the City would both treat Keen's tunnel claim as valuable in the future and transfer land to Keen in exchange for an agreement to abandon it, such a contract would likely be unenforceable because it requires future legislative action. That is, it would require the Assembly to agree in advance to authorize the exchange of unspecified parcels of land in the future.

Based upon on the foregoing, we conclude that even if Ordinance No. 85-53am did create a contract of some sort between Keen and the City, the City did not violate any enforceable obligations in the course of its negotiations with Keen.[8]

2. The Building Permits

The superior court granted summary judgment in favor of the City on Mount Juneau Enterprises' claims relating to the building permits on three grounds: failure to exhaust administrative remedies, statutory immunity for discretionary acts under AS 09.65.070(d)(2), and statutory immunity for actions relating to building permits under AS 09.65.070(d)(3). On appeal, Mount Juneau Enterprises challenges the superior court's conclusions that it failed to exhaust administrative remedies and that the City had discretionary immunity under AS 09.65.070(d)(2).

In Ben Lomond, Inc. v. Municipality of Anchorage, 761 P.2d 119 (Alaska 1988), rather than appealing the revocation of its building permit, Ben Lomond filed suit against the Municipality based on a claim of unconstitutional deprivation of property. We held that the failure to appeal the revocation of a building permit under applicable municipal appeal procedures barred any judicial action for damages based on the revocation. Id. at 121-22.

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[8] Mount Juneau Enterprises also argues that the City should be estopped from denying that Ordinance No. 85-53am constituted a settlement of the tunnel litigation. Estoppel may apply where there is: (1) an assertion of a position by conduct or word; (2) reasonable reliance thereon; and (3) resulting prejudice. Municipality of Anchorage v. Schneider, 685 P.2d 94, 97 (Alaska 1984). It was not reasonable for Keen to rely on Ordinance No. 8S-53am when it was Keen who failed to provide the City with the necessary stamped survey. Moreover, Mount Juneau Enterprises argues that Keen and Alaska Trams spent hundreds of thousands of dollars on construction of the tram and that the City "should be estopped from taking away the building permits to gain advantage in the tunnel litigation." However, Keen is the one who let the permit expire on its own terms. Keen's estopped arguments are without merit.

We stated that whether a court should require exhaustion of administrative remedies "turns on an assessment of the benefits obtained through affording an agency an opportunity to review the particular action in dispute." Id. at 121. To this effect, we noted that the basic purpose of the doctrine of exhaustion of administrative remedies is "to allow an administrative agency to perform functions within its special competence -- to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." Id. at 122 (citation omitted).

In Eufemio v. Kodiak Island HODS., 837 P.2d 95, 98 (Alaska 1992), we held that, in applying the doctrine of exhaustion of administrative remedies, a court must determine the following:

> 1) is exhaustion of remedies required; 2) did the complainant exhaust those remedies; and 3) is the failure to exhaust remedies excused?

The City has an ordinance specifically providing for an independent Board of Appeals to review disputed decisions or orders of the City building official. See CBJ Ordinance 19.02.010. The ordinances relating to building permits are contained within that same title.

Since an administrative appeal is clearly provided for, exhaustion of remedies is required in this case. Mount Juneau Enterprises did not avail itself of these appeals provisions. However, Mount Juneau Enterprises argues that the failure to exhaust remedies should be excused because (1) this suit was filed before the final administrative decision was made; (2) the final decision did not provide proper notice of the right to appeal; and (3) an appeal to the Board of Appeals would have been futile.

We find the first and third reasons to be without merit. And as to the second reason, Keen was given actual notice of the existence of the appeal provisions in a letter granting an extension of the FTA in 1989. Accordingly,

we find that all claims regarding the building permits are barred as a result of Mount Juneau Enterprises' failure to exhaust its administrative remedies.[9] Since the claims are barred, we need not reach the issue of whether the City is immune from suit under AS 09.65.070(d)(3) or AS 09.65.070(d)(2).

C. Further Discovery

Mount Juneau Enterprises filed a motion before the superior court to stay ruling on the motions for summary judgment pending further discovery under civil Rule 56(f).[10] The superior court denied the motion because Alaska Trams had sixteen months within which to conduct discovery,[11] Alaska Trams did not file an affidavit as required by the rule, the superior court did not believe that a genuine

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[9] Counts 7 and 8 of Mount Juneau Enterprises' complaint allege breach of contract arising out of the building permits. However, building permits are not contracts. 9A McQuillin, The Law of Municipal Corporations § 26.212, at 225 (3d ed. 1996). See also Rehmann v. City of Des Moines, 215 N.W. 957, 960 (Iowa 1927) ("a permit is merely a privilege to do what would otherwise be unlawful, and is not a contract between the authority, federal, state, or municipal, granting it and the person to whom it is granted").

[10] Civil Rule 56(f) provides as follows:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[11] To this effect, the superior court stated as follows:

Alaska Trams had sixteen months to conduct discovery in this case. (The suit was filed in June of 1991 and Judge Schulz imposed a stay of discovery in November of 1992.) During that time thousands of pages of documents have been disclosed, numerous depositions have been conducted, alleged privileged materials have been turned over or offered for inspection in camera. The deposition of the City's attorney, Barbara Blasco, alone, was close to 1000 pages;

issue of material fact would emerge from further discovery, and the superior court questioned the diligence of Alaska Trams. Civil Rule 56(f) specifically requires that an affidavit be filed with a motion for further discovery. See Munn, 777 P.2d at 192-93; Jennings v. State, 566 P.2d 1304, 1313-14 (Alaska 1977).

For the reasons expressed by the superior court, we conclude that it was not an abuse of discretion to deny the motion requesting further discovery.

V. CONCLUSION

The superior court's grant of summary judgment in favor of the City is AFFIRMED in all respects.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

MOUNT JUNEAU ENTERPRISES, INC., ALASKA TRAMS, INC., ARNT I. ANTONSEN, CHARLES D. KEEN, and KAREN KEEN,

Plaintiffs,

v.

THE CITY AND BOROUGH OF JUNEAU (a municipal corporation), BRUCE BOTHELHO, CAREN ROBINSON, ROSALEE T. WALKER, KIM S. ELTON, DENNIS W. EGAN, ROSIE PETERSON ERROL CHAMPION, GEORGE DAVIDSON, JOHN MacKINNON, DEVIN RITCHIE, BARBARA BLASCO, and MURRAY WALSH,

Appellees.

No. 1KE-91-642 CI

DECISION ON MOTIONS

The Defendants in this case, collectively referred to as the City, have moved for summary judgment on 16 or the 17 counts of the Complaint.

In June of 1913, Kohn, Caro and Reck received patent to their three claims. Unfortunately, by 1949 the owners were delinquent in their tax payments and the Juneau Independent School District foreclosed on the claims. On September 28, 1954, J.S. Caro and A.R. Duncan paid the delinquent taxes and received a tax deed to the claims.

In 1968, the Alaska Juneau Gold Mining Company merged with other interests and became AJ Industries, Incorporated. AJ Industries Becky the successor

to all property and easements owned by the Alaska Juneau Gold Mining company.

Later, on January 3, 1974, AJ Industries conveyed its interest in Tunnel No. 3 to Alaska Electric Light and Power Company by a statutory quitclaim deed.

In the meantime, beginning sometime in 1972, Charles Keen, one of the plaintiffs in this case, had an idea to turn Tunnel Number 3 into a tourist attraction. Keen knew that the tunnel had been used as a tourist attraction in the 60's, and thought he might be able to expand upon this idea. He learned that the tunnel ran under the Red Jacket and White Wing mining claims. He went to the Borough assessors office and learned that a Mr. Leon Idso had been paying the taxes on the claims for many years. He contacted Idso, and Idso told him he had purchased the tax deed on the claims.[12]

Keen acquired an option to purchase the claims from Idso. At his deposition, Keen could not remember the date he acquired the option although in his affidavit he states that he believes he acquired it in 1971 or 1972. So does not remember how much he paid for the option, and at his deposition he did not even know if it was in writing. Later, in his affidavit, Keen implies that the option was a written agreement. He is also vague about the terms of the agreement.

About the time Keen acquired the option, he also began to consider a plan to build an aerial tram from downtown Juneau to the top of Mount Juneau. He thought that the three claims, which are located on Mt. Roberts and on the way up to Mt. Juneau, would make a good place for the mid-point tram tower.

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[12] The sale from Caro and Duncan to Idso it not clearly established in the record This ambiguity, apparently, resulted in a lawsuit that was brougiit by Duncan's successors in 1985. This suit was eventually settled such that this conveyance is not now an issue.

Also, about this time, the city began to consider using one of the old AJ tunnels as a water reservoir Alaska Electric conveyed a permanent easement for the transmission and storage of water in tunnel Number 3 to the city on June 18, 1974.

Studies for the development of the tunnel as a water reservoir were conducted, and in 1977 the city appropriated funds for the project. A contract for the construction was awarded and construction began in September of 1977. The reservoir was completed in late 1978 and filled with water in the spring of 1979. A major leak And other problems were discovered. The leak was repaired and the tunnel reservoir contract was deemed completed on November 1, 1979. The tunnel has been used for water storage since October 31, 1979. However, there were continuing problems and additional work was necessary construction was not considered complete until day of 1982.

Keen heard and read that the City was capping a tunnel for water storage. He was concerned and contacted duty officials but he testified that he was assured that the tunnel being capped was not the same tunnel he was interested in. On October 5, 1981, Keen exercised his option on the three claims and signed an earnest money agreement with Leonard Idso Keen purchased the three claims for $5000 in cash and a note to pay another $5000 within ninety days of closing. The agreement provided for the sale of the three claims but also specifically provided that no personal property was being transferred. In addition, the agreement provided that the claims were conveyed subject to "easement of record." The Keens quitclaimed their interest in the claims to Alaska Trams on October 22, 1981.

Keen has testified, somewhat confusingly that he first learned that the tunnel under his claims was the tunnel being used as a water reservoir just prior to the purchase of the claims or just after the purchase. At any rate, after he found out about the water reservoir, he notified the City that it was trespassing. After lengthy negotiations failed to resolve the claims concerning Tunnel Number 3, Alaska Trams

brought suit over the tunnel in a bankruptcy proceeding on October 5, 1987. This suit was filed June 25, 1991.

THE CITY'S MOTION FOR SUMMARY JUDGMENT ON TUNNEL CLAIMS

The City has filed a motion for summary judgment on Counts 1 - 5 in the complaint. These counts concern the tunnel claims. A motion for summary judgment requires the court to determine whether genuine issues of material fact exist and whether the moving party is entitled to summary judgment as a matter of law. Zeman v. Lufthansa German Airlines, 699 P 2d 1274, 1280 (Alaska 1985) The moving party has the burden or showing that there are no genuine issue or fact in dispute. McGee Steel Co. v. State, McDonald Industries, 723 P 2d 6ll, 615 (Alaska 1985) The opposing party is not required to demonstrate that they will prevail at trial. Rather, after the moving party has met its burden, the opposing party must show that genuine issues at material fact exist. All reasonable inferences of fact must be drawn against the moving party. Champion Oil Co. v. Herbert, 578 P 2d 961, 963 (Alaska 1978), cert denied, 439 U S 980, 58 L Ed.2d 650 (1979) A material issue of fact in dispute exists if reasonable jurors could disagree on the resolution of the factual issue. McGee, 723 P 2d at 614.

The City argues that there are no genuine issues of material fact in dispute, and that summary judgment must be granted in its favor because, as a matter of law, it has a valid easement to use the tunnel as a reservoir or, if the easement does not cover use of the tunnel as a reservoir, its use of the tunnel is permissible under the doctrines of inverse condemnation or adverse possession.

The court need not address the easement or adverse possession arguments since the City's taking of the tunnel constituted an inverse condemnation.

AS O9 SS 240(a)(4) and (5) provide that municipalities may exercise the right of eminent domain for public uses including "sites for reservoirs necessary for collecting and storing water[.]" If a municipal government

takes private property under the mistaken belief that it has a right to do so, then an inverse condemnation occurs. State, Department of Highways v. Crosby, 410 P.2d 724, 728-729 (Alaska 1966); Juneau, 557 P 2d 783, 784 (Alaska 1976).

Here, the city argues that it took the tunnel for public use when the work began to cap the tunnel in 1977. If the city was mistaken in its belief that the easement from Alaska electric included use of the tunnel as a reservoir, then, according to the City, an inverse condemnation occurred on the taking. The City points out that compensation for inverse condemnation is a personal right that is not conveyed by dead to a subsequent owner. Riekniro, 557 P ad at 785; Williams v. City of Valdez, 603 P.2d 483, 490 (Alaska 1979) affirmed after remand:, 624 P 2d 820, 821 (Alaska 1981}; 2 Sachman, Nichols on Eminent Domain, sec. 5.01[4] at 5-29 to 5-35 n.29 (Rev. 3d ed. 1990). Since the taking occurred in 1977, or 1979 when the tunnel was first filled with water, any compensation for the taking is due the owner of the claims at that time and not to Alaska Trams.

The City has met its burden on the issue of inverse condemnation. To defeat summary judgment, Alaska Trams must establish that material issues of fact exist.

Although Alaska Trams does not concede that an inverse condemnation occurred, it does not argue this point. Rather, Alaska Trams raises three arguments that, if correct, would modify the outcome of this dispute under the doctrine of inverse condemnation.

First, Alaska Trams argues that the City did not take the tunnel for inverse condemnation purposes until 1982. By 1982, of course, Alaska Trams owned the mining claims and therefore any compensation due the owner for the taking would be owed to it. This argument is based on some deposition testimony and on the affidavit of Carlton Laird. Mr. Laird was the City Manager from 1980 to 1982 and he remembered that the tunnel was first filled with water in late 1981. Also, this argument is based on the fact that construction was not finally completed until 1982.

In response, the City offers the affidavit of George Porter who was the Director of Public Works in 1978 Mr. Porter says that he knows the tunnel was filled with water in 1979 because he was there and he signed the "Notice of Final Completion" for the tunnel construction project on November 14, 1979 Mr. Porter also says that further construction work did take place after 1979 to remedy problems but this was relatively minor work. Finally, Mr. Porter attests that the tunnel has remained filled with water since 1979 except for brief periods of two or three weeks when it was drained to fix leaks.

In addition, the City argues that even if there is a factual dispute about exactly when the project was completed, that dispute is of no consequence. The City points out that "[W]here an entry is made upon property by the condemnor and an act committed which indicates an intent to appropriate the property, the taking is complete" 2 Suchman, Nichols on Eminent Domain, sec. 6.01[2] at 6-18 to 6-19 n.34 (Rev. 3d ed. 1990). It is not disputed that construction began on the tunnel in 1977. In Wickwire, the supreme court found that the taking occurred when construction began. Wickwire, 557 P.2d at 784. Here, there is no doubt that the City took acts which indicated its intent to appropriate the property in 1977.

Next, Alaska Trams argues that its predecessor in interest (Keen) had an option to purchase the mining claims as of 1972. Based on this option, Alaska Trams argues that it has the right to receive compensation and not the prior owner. The terms of the option are vague and have been variously described as an option to purchase or as an option granting Keen the first right of refusal on any offer to purchase. The document memorializing the option has never been produced. Also, it is not clear that such an option would entitle Alaska Trams to compensation for the inverse condemnation. Alaska Trams cites no cases supporting this proposition. Furthermore, and more importantly, the right to compensation for inverse condemnation is a personal right and not a right that runs with the land. Williams, 624 P.2d at 821; Wickwire, 557 P.2d at 785 n.7. The right to receive compensation for adverse condemnation does not pass to the

buyer unless the parties expressly agree to that arrangement. Wickwire, 557 P.2d at 785 n.7. The earnest money agreement signed by Idso and Keen in 1981 did not mention the right to receive condemnation proceeds. Thus, even if Keen had some interest in the property based on the option, the interest did not include any interest in receiving compensation for the City's taking.

Finally, Alaska Trams argues that due to the negligence and bad faith of the City, it should be able to sue for damages outside the remedy afforded under the doctrine of inverse condemnation. However, the nature of the inverse condemnation doctrine is to allow a landowner to obtain fair market value for property that has been taken by the government by mistake or negligence, Crosby, 410 P.2d at 728-29; Wickwire, 557 P.2d at 784. This doctrine flows from a government agency's right to exercise the power of eminent domain. If a mistake is made or a taking by the government is wrongful, the remedy is inverse condemnation. As already pointed out, Alaska Trams, would not prevail in an inverse condemnation action because it was not the owner at the time of the taking. No authority has been offered by Alaska Trams that would allow a subsequent owner an additional cause of action when that same subsequent owner is not entitled to relief in the inverse condemnation action.

Finally, all the bad faith acts mentioned by Alaska Trams, with one exception, occurred after the taking of the tunnel. While these acts may support other causes of action, and indeed Alaska Trams has relied on these same acts as a basis for other counts in the Complaint, they do not support the extension to the inverse condemnation action Alaska Trams asserts here because they arose too late. The one act complained of that was done by the City before the taking was to rely on the easement received from Alaska Electric. If this was wrong, it was a mistake of the sort that the doctrine of inverse condemnation is specifically created to address.

For the Above reasons, there are no material issues at fact in dispute and summary judgment is granted in the City's favor on Counts 1 - 5 of the Complaint.

STATEMENT OF FACTS -- THE NON-TUNNEL CLAIMS

As already noted, during the time that Chuck Keen was considering the possibilities for the tunnel, he was also thinking about building a tram to the top of Mt. Juneau. Beginning in 1976, the City became involved in Keen's plans for the tram.

The first plan called for the tramway to span the distance between terminus on South Franklin Street and the top of Mt. Juneau. This span required a mid-point tower that was to be located on Gastineau Ridge. To develop this plan, Alaska Trams needed a small piece of City land on Gastineau Ridge for the mid-point tower and a conditional use permit that would allow the construction. The City leased the land and issued the necessary building permit.

Two years later, Keen asked the City to sell him a piece of City-owned land on South Franklin that Alaska Trams needed for the lower terminus of the tram. After negotiation, the City agreed to sell the land but attached a reversion clause to the deed. That clause provided that if the land was not developed into the terminus in four years, the City could buy the land back at the price paid plus interest.

Over the years, the four year deadline was extended by the City several times and the reversion clause was modified so that all Keen had to do to avoid reversion was to make a "substantial start" on the project.

In 1984, the City modified its procedures and required contractors with conditional use permits to secure building permits and begin construction within 18 months. Keen applied for a new permit that was based for the same construction plan originally outlined in 1976. This permit was to expire in February of 1986.

In the meantime, Keen and the City were trying to resolve the dispute over the tunnel. On February 25, 1985, he wrote to the City and made an offer to settle the dispute. That offer, after negotiations, modifications, public input, amendments and one failed attempt by the City Assembly to accept the terns, was finally passed as Ordinance 85-53(am) on July 1, 1985. The Ordinance sought to resolve the tunnel dispute and facilitate Keen's tram project. It provided, in relevant part, that Keen was to give the City an easement for the tunnel and, in exchange, the City would "convey to Keen an easement for a road and parking lot over City property connecting Red Jacket, White Wing and Black Diamond mining claims to the nearest existing road." But the Ordinance conditioned conveyance of this easement "on Keen providing the manager with a stamped survey describing the location, scope and extent of the easement at a location and size to be approved by staff in accordance with existing planning and zoning standards." The language concerning the parking lot and the need to meet existing planning and zoning standards was added by amendment. The Ordinance authorized the sale of the land to Keen that had been leased to him for the mid-point tram tower, and removed the reversion clause from the deed to the South Franklin property.

At some point, Keen decided to change the plans for the tram. He had become involved in an air rights dispute that made development on South Franklin difficult so he decided to forego the plan for locating the lower terminus there. Instead, he decided to place the lower terminus on his mining claims. He envisioned a road and parking lot on City land near his claims. The tram would span the distance from the lower terminal on the claims to the top of Mt. Juneau. Apparently, because the span was shorter, a mid-point terminal was not necessary. Keen claims that the Assembly knew about the change of plans when it passed Ordinance 85-53(am). The City disputes this.

What is clear is that City staff was still under the impression that the original plan was in place until mid-July, 1985. On July 17, 1985, a City Planner, Karen Boorman, wrote to the city Manager And explained the

various zoning and building conditions Alaska Trams would have to meet to complete the project. The memo refers to the 1976 requirements, the 1984 requirements under the conditional use permit, and all the design, parking and zoning specifications that would have to be met. Since the 1976 conditions and the 1984 permit involved the original plan, it seems clear that Boorman, at least, believed the original plan was still in place. A few days later, however, Boorman met with Keen's representatives, and the modifications to the original plan were discussed. On August 12, 1985, in a memo to the City Manager, Boorman wrote that "the project as it is now envisioned..." calls for "a tramway with a terminal base and a parking area in Gold Creek Basin." She concluded that the new plan would have to be evaluated by the Planning Commission and that Keen would have to proceed through the conditional use permit procedure.

Later that same month, Keen was told by Boorman that the new plan would need a new conditional use permit. In September, another City planner told Keen's engineering consultant that the tourist facilities on Gastineau Ridge would require a zoning change or another conditional use permit.

Also in September, the acting city Attorney, John Corso, in a memo to the City Lands Committee, expressed doubt about Keen's title to the tunnel because of a lawsuit between Keen and the Estate of Sidonia Duncan.[13] Corso advised City staff that the land transfers contemplated by ordinance 85-53(am) be delayed until the lawsuit over title to the claims was resolved. Corso also advised that the title dispute might give the City a rare opportunity to negotiate better terms with Keen.

In January of 1986, the City Manager wrote to Keen asking him to provide the survey required under Ordinance 85-53(am). In February of 1986, the 1984

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[13] See footnote 2, supra.

conditional use permit was due to expire. However, the City Assembly renewed and extended it in Ordinance 86-11. The new permit was not to expire until eighteen months after entry of final judgment in a lawsuit over air rights that Keen was involved in, or one year after the effective date of Ordinance 86-ll, whichever was later.

Several months later, in October, the city Manager wrote to Keen again asking for the survey required by Ordinance 85-53(am). A few days later, however, the City Manager wrote back and explained that the need for the survey could be postponed until the Planning Commission decided whether the project was consistent with planning and zoning standards. In November of 1986, the City Manager reported that Keen's new plan for the tram raised several planning and zoning problems that would entail rezoning and a lengthy public process. He felt that the new plan may not be workable and suggested looking for alternative plan.

In the meantime, Keen did apply for a zoning change for the land near his mining claims but because of the numerous problems identified with that plan, he cooperated with city staff to find an alternative route. The alternative agreed upon called for the terminus to be back on South Franklin Street, but this time located on municipal land to avoid the air rights dispute that disrupted in the first plan. A near conditional use permit was issued for the new plan in April of 1987. The new permit was to expire in October of 1988.

To effectuate the land transfer contemplated by this third plan, another Ordinance was introduced to the Assembly. This Ordinance, number 87-30, provided that the City would transfer land on South Franklin to Keen for the terminus in exchange for the release of the tunnel claim. The Ordinance was hotly debated at the Assembly meeting on May 4, 1987, and it ran into heavy public opposition. Of primary concern was the lack of an appraisal on the value of the tunnel claim. It was defeated by a 4 to 3 vote of the Assembly.

Since July of 1985 when Ordinance 85-53(am) had been passed, three other events of importance were taking place.

First, in mid-1986, Alaska Trams filed for Chapter 11 protection under the bankruptcy code so that it could reorganize. Next, the City's attorneys began to interpret Ordinance 85-53(am) as a narrow ordinance designed to settle the tunnel claims by authorizing the city Manager to negotiate a settlement and to transfer City land as part of the deal. Keen, on behalf of Alaska Trams, has always contended that the Ordinance was a contract that required the city to act, not just negotiate. Finally, the City's attorneys, other city personnel, and some Assembly members, came to believe that Keen's tunnel claim was worthless and they ordered an appraisal to value that claim.

Another Ordinance was introduced to the Assembly just after the defeat of Ordinance 87-30. This Ordinance, numbered 87-34, was introduced in June of 1987. After its introduction, the parties began to negotiate changes to address certain of the problems that defeated Ordinance 87-30. Also, before the revised version of the Ordinance was taken up by the city Assembly, the appraisal of the mining tunnel claim was completed. This appraisal suggested the claim had a value of zero. As a result, the Assembly directed stars to remove certain reversion any repurchase provisions in this latest version of the Ordinance and to provide for a sale of City land at fair market value subject to a discount to reflect the litigation value of Keen's claim. This third version of the Ordinance was eventually passed by the Assembly.

Keen did not support this Ordinance. He refused to negotiate the fair Market value. Apparently, to get around the stalemate, Keen suggested that the tunnel claim issue be handled separately from the land purchase issues. In fact, by this time, Keen had filed suit against the City over the tunnel claim in the bankruptcy proceeding. In response to the suggestion to separate the issues, the City passed Ordinance 88-03. This Ordinance authorized the sale of the land and air rights needed by Keen without compromise to his tunnel

claim. Also, the ordinance required that Keen satisfy several pre-conditions before any land transfers could occur. These conditions were to be met by December 5, 1988.

There were additional delays. Keen was unable to get bankruptcy court approval to pursue the options under Ordinance 88-03 and did not obtain the required surveys. The Assembly extended the deadline, and finally on July 12, 1989, after all obstacles were resolved, the land transfers were completed.

While the land transactions were being resolved, the 1987 conditional use permit was set to expire in October of 1988. Prior to the expiration, Keen applied for a "fast track authorization" permit that would allow him to build the project in phases. The permit was applied for in the name or Alaska Trams and a new Keen corporation, Mount Juneau Enterprises Incorporated, and was eventually granted. This fast track permit allowed excavation work to start at the South Franklin site. The permit required that the work be started by April 28, 1989, and it required that the work continue until completed.

The starting date under the permit was extended until October of 1989. The work was finally started then and continued on and off until late spring of 1990. At that point, a retaining wall was needed to stabilize the excavation site. However, Keen left on a trip, some of his equipment was stolen or vandalized, and he ran into other difficulties that delayed further work at the site. The city complained about the delays and warned Keen that his permit would expire unless work continued. Then, in September of 1990, Keen's primary creditor moved the bankruptcy Court to convert the Chapter 11 reorganization to an involuntary Chapter 7 bankruptcy. Keen told the City that because of the conversion motion he could not work.

In October of 1990, the City decided that it was willing to extend to permit, in spite of the delays, if Keen provided liability insurance and a bond to insure completion of the wall. Keen did submit an insurance policy and a commitment from a construction company but these did not

meet the City's specifications. The City set a January 22, 1991, deadline for providing the insurance coverage and the building commitment.

In the meantime, the bankruptcy was converted to an involuntary Chapter 7 proceeding, and the City began to deal with the bankruptcy trustee, Gordon Zerbetz and his attorney, Eric LeRoy. The insurance coverage and building commitment deadline was extended by the City, at the request of the bankruptcy trustee, until February 1, 1991.

On January 25, 1991, the City Manager, Kevin Ritchie, was interviewed by a radio reporter. Ritchie said that he could not think of a good reason to extend the permit past its last expiration date for Keen but that the City would cooperate with the bankruptcy trustee.

Finally, after the deadline, the insurance was posted and a contractor did sign an agreement to complete the work if Keen failed to complete it. However, the contractors guarantee was conditioned on Mount Juneau Enterprises, the new Keen corporation, retaining the building permits.

After the bankruptcy trustee became involved, the City opened discussions about the status of the permit. The City informed the trustee that if the project was cancelled for reasons outside the applicant's (Alaska Trams') control, the City would be able to refund $27,000 of unexpended building permit fees to the bankruptcy estate. The trustee's attorney informed the City that the project was cancelled.

Immediately, Mount Juneau objected to the cancellation. A motion was filed before the bankruptcy court seeking to stop the cancellation or the permit. After a hearing on the motion, the bankruptcy judge refused to enter any order. The judge did suggest, however, that the trustee could not unilaterally abandon the permit, and furthermore, if he took any action that affected the permit he had to give notice to all creditors and put on a hearing.

Given the bankruptcy judge's position, City personnel met with Keen to work out a reasonable period to complete the retaining wall. The meeting was difficult. Keen believed that Ritchie's statements to the radio reporter and to a newspaper effectively ended his hopes for financing and caused great injury to his project. Keen said he would not discuss resolving the matter unless the City took out a full page newspaper ad apologizing to him. He explained that if the ad was not taken out "we are going to war and we're going to do it quick."

At the meeting, the City agreed to confirm in writing that the permit was valid and that Keen could proceed under the permit. On April 5, 1990, the City extended the time period within which Keen was to complete the retaining wall until May 31, 1991.

The City did not put an ad in the paper; Keen did not comply with the May 31st deadline and the complaint in this case was filed on June 26, 1991. On July 24, 1991, the city attorney informed Keen that the permit had expired.

THE CITY'S MOTION FOR SUMMARY JUDGMENT ON THE NON-TUNNEL CLAIMS

The Complaint alleges several causes of actions. These causes of action are described as a breach of contract based on failure to perform under the Ordinances (count 6), breach of contract based on threats to cancel the permits (count 7), manipulation of the bankruptcy process (count 8), slander of permits (count 9), breach of fiduciary duty inherent in granting the building permits (count 10), conspiracy to violate the bankruptcy stay and seize the permits (count 11), conspiracy to prevent the financing and building of the Mt. Juneau tramway (count 12}, fraud and deceit by the City to profit from, and interfere with, the Mount Juneau Tramway (count 13), ultra vires actions by City officials and the Assembly (counts 15 and 16), and finally, punitive damages (count 17).

A. Ordinance 85-53(am) -- Count 6

The City moves for summary judgment arguing that Ordinance 85-53(am) is not a contract and even if it is a contract, the city did not breach it, Alaska Trams did.

An ordinance may constitute an offer to contract. 1 Williston, Williston on Contracts at 282-283 (4th ed. 1990).

Hear, the language of the Ordinance supports Alaska Tram's argument that it established the terms of the settlement agreement between the parties. The City does not seriously dispute that the Ordinance established certain rights and duties in the parties. Both the City and Alaska Trams argue that the other party breached the duties established by the ordinance. The court concludes that the Ordinance did establish rights and duties and that the real issue is whether the parties complied with their obligations.

There is no legitimate issue in dispute on this claim. Alaska Trams was required, as a condition precedent to the City's performance, to provide a stamped survey showing the location and size of the easement that could be approved by city staff in accordance with planning and zoning ordinances. This was never done. It does not matter whether the Assembly was aware of Alaska Trams decision to move the lower terminus to Gastineau Ridge when the ordinance was passed. The important issue is whether the plan to establish the tourist Attraction on Gastineau Ridge could have met planning and zoning requirements. After considering this issue, the City staff concluded that the new plan raised significant planning and zoning problems and it would entail a lengthy public hearing process. The City suggested an alternative route be considered and offered to help Alaska Trams agreed to this.

A new route was planned and eventually land transferred and work began. There is no breach by the City, or by Alaska Trams for that matter concerning the new plan. The parties just agreed to do something else. Summary judgment is granted in favor of the city on this issue.

B. The Building Permits (Counts 7-8)

Alaska Trams claims that the city breached its contract "evidenced by the building permits" by failing to comply with the permits and by manipulating the bankruptcy proceedings. The City moves for summary judgment on these counts arguing that Alaska Trams failed to exhaust administrative remedies before bringing suit. Alaska Trams responds by arguing that the administrative remedies were never made available, that the City's position on the permits constantly
changed, and that the permits were taken without due process of law.

The Alaska Supreme Court, in Eufemio v. Kodiak Island Hospital, 837 P.2d 95, 98-99 (Alaska 1992), held that three issues must be resolved when applying the exhaustion of administrative remedies doctrine. First, the court must consider whether administrative exhaustion is required. Second, if it is, then the court must consider whether the remedies were exhausted. Third, if the remedies were not exhausted then the court must decide whether the failure should be excused.

A City ordinance provides for an independent board of appeals to hear appeals from decisions by the City concerning building issues. CBJ Ord. 19.04.101(d). In Ben Lomond, Inc. v. Municipality of Anchorage, 761 P.2d 119, 121 (Alaska 1988), a builder's building permit was revoked. The Court held that the doctrine of exhaustion of administrative remedies is to allow an agency the chance to apply its special expertise, to correct its errors and to make a factual record. Id. at 122. The Court also held that "requiring exhaustion is particularly appropriate where a complainant raises both constitutional and non-constitutional issues...because successful pursuit of a claim through the administrative process could obviate the need for judicial review of the constitutional issues." Id.

Alaska Tram's argument that administrative review was not offered is without merit. There is no

evidence to suggest that Alaska Trams was denied access to the appeal board. The argument that the City kept changing positions is factually correct, but these changes were, in most cases, to accommodate Alaska Trams. In those instances where the City remained firm, Alaska Trams always had the option of the appeal. Furthermore, the City's final position on the start up date for the retaining wall was clear - May 31, 1991. That deadline passed and now the City considers the permit to have expired.

The court concludes that the issues surrounding the permits were required to be reviewed by the appeals board. Since Alaska Trams did not pursue these issues before the appeals board, the court must decided whether it was excused from seeking administrative review.

Alaska Trams has not argued or presented any evidence that would support excusing its failure to seek review from the appeals board. The method of the review was not contested. See, Kleven v. Yukon-Koyukuk School District, 853 P.2d 518, 525 (Alaska 1993). Initially, Keen did not even argue that administrative review would have been futile. See, Casey v. City of Fairbanks, 670 P.2d 1133, 1136 (Alaska 1983). In subsequent pleadings this issue was raised. Other then certain general allegations of the City's unfairness that are discussed below, Keen offered no proof that the independent appeal process established by ordinance would not provide a full and fair review. Furthermore, and of significance here, an appeal concerning Keen's gift cart permit was settled favorably to him. This certainly undercuts Keen's concerns about the futility of such action. Finally, he argues that review was not offered or possible under the circumstances. As noted above, this is not correct. There is no issue in dispute on these claims. Summary judgment is granted in favor of the City.

C. The Tort Claims (Counts 9-13)

Counts 9-13 allege tortious actions involving the permits. The City asks the court to award summary judgment to it on two affirmative defenses. First, it asserts that the statute of limitations bars any claims arising before June 26, 1989, as a matter of law. Second, the City argues

that it is immune from liability for damages for actions taken with respect to the permits.

The Complaint was filed on June 26, 1991. Therefore, according the City, under AS 09.10.070., any claims arising before June 26, 1989, are barred. Alaska Trams argues that the "continuing nature and extend" of the individual City defendants' acts were not known until the completion of discovery.

It is unclear from the pleadings exactly what claims are based on conduct that occurred prior to June 26, 1989. While both parties are correct in their interpretation of the law concerning the statute of limitations, the court does not believe that this issue must be decided. This immunity defense resolves these claims.

The City argues that it is immune from liability for actions taken with respect to the building permits. The City relies on AS 09.65.070(d). The applicable provisions of this statute read:

> (d) Not action for damages may be brought against a municipality or any of its agents, officers or employees if the claim
>
> ...
>
> (2) is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty by a municipality or its agents, officers, or employees, whether or not the discretion involved is abused;
>
> (3) is based upon the grant, issuance, refusal, suspension, delay or denial of a license,

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[14] No person may bring an action (1) for libel, slander, assault, batter, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not specifically provided otherwise...unless commenced within two years.

permit, appeal, approval, exception, variance, or other entitlement, or a rezoning.

The City first argues that the actions of its employees or agents were discretionary under AS 09.65.070(d)(2) and therefore, this immunity provision applies to this case. Discretionary functions include policy making decisions, decisions to undertake an action or planning decisions. State v. I'Anson, 529 P.2d 188, 193 (Alaska 1974). Once the decision is made and the action selected, the manner in which the action is carried out is operational conduct and that conduct must be performed safely. Id. Discretionary acts "are those which require 'personal deliberating, decision and judgment...'" Integrated Resources Equity, Corp. v. Fairbanks North Star Borough, 799 P.2d 295, 301 (Alaska 1990), quoting, Utah State University of Agriculture and Applied Science v. Sutro & Co., 646 P.2d 715, 721 (Utah 1982).

Since all the complaints raised by Alaska Trams concern decisions made by City personnel or the City Assembly, the immunity provided by AS 09.65.070(d)(2) applies. However, Alaska Trams extends the argument by claiming that the employees and/or the City Assembly acted without authority and that in taking some action they violated clearly established law.

In order to establish liability, the government must have "violated 'clearly established' law, unless the [government] can prove that [it] non-negligently [was] not aware of the law." Integrated Resources, 799 P.2d at 301 (citing Breck v. Ulmer, 745 P.2d 66, 72-73 (Alaska 1987)). The violation must be in exercising a purely ministerial function as opposed to an exercise of judgment in e interpretation of the law as applied to the particular facts. Id.

Alaska Trams does not point to any specific instances or provide other evidence that the City and the other defendants knowingly acted without authority or in violation of the law. Alaska Trams merely claims that "memoirs of the City Attorney and City Manager provide direct evidence that they were entirely aware of the unlawful nature of their

actions." Presumably, this is in reference to memos written by the City's legal department evaluating possible claims which might be made against the City regarding the permits. This is not evidence that the City knew that it was violating the law. It is simply an attorney's review of the problem and the possibilities. This kind of advice and a description of the legal strong and weak points of a position are merely preludes to the decisions. The advice may be wrong and the decision may be wrong, but immunity still applies. See, Troxel v. Town of Basalt, 682 P.2d 501, 503 (Colo.App. 1984).

Alaska Trams claims that City employees acted deceitfully and fraudulently and that they defamed Alaska Trams. If this were true then immunity would not protect the City. However, other than the allegations raised in the Complaint, there has been no effort to support these claims. The City argues that the alleged fraudulent and deceitful acts that occurred before June 25, 1989, are barred by the statute of limitations. The court has not reached this issue. What can be said about these allegations, however, is that even though Keen did not like many of the actions taken by the City Attorney, the Planning Department employees and the City Manager, he has not shown that nay of these employees' decisions and actions were deceitful., fraudulent, defamatory or that the acts were unauthorized.

For example, much is made of the agreement to refund $27,000.00 in permit fees if the Bankruptcy Trustee cancelled the project. Keen complains that this action is clear evidence of the City employees' fraud and deceit. But he has not demonstrated how this is unlawful or why it is fraudulent or deceitful. It appears to be a reasonable effort to put to rest a long, complicated and difficult situation that had been exacerbated by Alaska Trams' long delays, inability to proceed even on the initial phase of the project and bankruptcy.

Keen also complains about the unauthorized resistance demonstrated by City employees to his project. This is not a fair reading of the record. What appears from the record is that his project, once embraced by the City leaders in the mid-seventies to the mid-eighties, simply ran

low on political support. After the modification to the original plans and the determination that the tunnel claim was worthless, all attempts to further this project ran into greater public opposition. A natural and direct result of public opposition is political reaction. This City's early embrace became a political liability. It is not that the City acted fraudulently or deceitfully, the City simply was caught, as was Keen, in a changing political current. The tram still could have gone forward but Keen would have been required to meet the greater demand imposed by the more vehement public scrutiny and opposition. Keen has pointed out several negative inferences that can be drawn from the City's cautious approach to this project. But these unsupported inferences alone do not create a material issue in dispute with respect to his claims of fraud and deceit.

Finally, the conduct supporting the defamation claim is not apparent. Perhaps Keen is alleging that the City Manager's comments to the radio reporter on January 25, 1991, are defamatory. If this is the allegation it fails. The City manager was simply reporting the current status of the permit. It is not clear how this is defamatory.

The City also claims that the conduct regarding the building permits is immune under AS 09.65.070(d)(3). The purpose of this provision is to "protect the public treasury by barring actions seeking money damages for injuries alleged to be the result of municipal licensing, permitting, entitlement and zoning procedures and decision." J & L Diversified Enterprises, Inc. v. Municipality of Anchorage, 736 P.2d 349, 352 (Alaska 1987).

Alaska Trams argues that this statute does not apply here because it does not cover the cancellation of a permit. The statute provides immunity for the "refusal," the "suspension," the "delay" or the "denial" of a permit. While the statute does not say cancellation, a fair reading must include actions taken that would end the applicant's ability to build the project. Reading the statute this way comports with the Supreme Court's holding in J & L Diversified Enterprises, 736 P.2d at 352, that the statute should be

construed broadly. Furthermore, the permit in this case was not cancelled. It was repeatedly modified and extended. All of the extensions were for Alaska Trams' benefit. The modifications were attempts by the City to protect itself from liability and to comply with the permitting process. While Alaska Trams could have sought administrative review of these actions, it chose not to. In the end, the permit was still valid but Keen let it expire without taking action.

Summary judgment on the grounds of statutory immunity under AS 09.65.070(d)(2) and (d)(3) is granted in favor of the City.

D. Ultra Vires Actions (Counts 15-16)

Counts 15 & 16 of the Complaint allege that City employees and the Assembly committed unauthorized acts and therefore violated the doctrine of ultra vires. These issues have been dealt with above. The employees acted within their authority as did the Assembly. Alaska Trams has not offered any contrary evidence. Summary judgment is granted to the City on counts 15 & 16.

E. Punitive Damages (Count 17)

Count 17 asks for punitive damages in compensation for the wrongs committed by the City against Alaska Trams. Given the rulings above, summary judgment must also be granted against Alaska Trams on its claim for punitive damages.

OTHER MOTIONS

Pending decision on the motions for summary judgment, Alaska Trams has filed three additional motions and the City has filed one more as well. The first motion

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[15] In J & L Diversified Enterprises, the Court held AS 09.65.070(d)(3) applicable to an allegation of abuse of process against a municipality even though the statute did not explicitly exempt municipalities from these actions. Id.

filed by Alaska Trams was to stay ruling on the motions for summary judgment pending further discovery under Alaska Rule 56(f). This motion was denied by the court in October of 1993. Requests under Alaska Civil Rule 56(f) are usually freely granted. Jennings v. State, 566 P.2d 1304, 1313 (Alaska 1977). However, when the moving party has been dilatory or the requested additional discovery is merely cumulative, the motion should be denied. Id.; 10A Wright, Miller & Kane, Federal Practice and Procedure, Section 2741 at 558 (2d ed. 1983). Furthermore, the Rule requires that an affidavit be filed with the motion setting forth why the facts essential to defeat the motion for summary judgment are not available. Jennings, 566 P.2d at 1313-14; Munn v. Bristol Bay Housing Authority, 777 P.2d 188, 192-93 (Alaska 1989).

Here, Alaska Trams did not file an affidavit as required by the Rule. In this case such an affidavit is essential. As noted in Wright, Miller and Kane, and quoted in Munn, "While 'a few courts' have required a party invoking Rule 56(f) to show what facts are sought through further discovery and 'what steps have been taken to access them[,]... these requirements have [generally] been imposed only when the court is skeptical about a genuine issue ever emerging, or when the party opposing summary judgment has been less than diligent in employing discovery.'" Federal Practice and Procedure, Section 2740 at 530-32, quoted in Munn, 777 P.2d at 193. In this case, the court does not believe a genuine issue in dispute will emerge from further discovery. Further, and most importantly, given the tremendous volume of discovery undertaken to date, the court seriously questions the diligence of Alaska Trams.

Alaska Trams had sixteen months to conduct discovery in this case. (The suit was filed in June of 1991 and judge Schulz imposed a stay of discovery in November of 1992.) During that time thousands of pages of documents have been disclosed, numerous depositions have been conducted, alleged privileged materials have been turned over or offered for inspection in camera. The deposition of the City's attorney, Barbara Blasco, alone, was close to 1000 pages. Despite all this, Alaska Tams now wants to depose

the remaining parties not previously deposed, depose additional non-parties, and re-depose Barbara Blasco.

The requirement of the affidavit is fundamental in a situation like this. Alaska Trams' failure to establish that the people it now wants to depose were not available or were uncooperative or that it was somehow stymied from conducting these depositions during the sixteen month discovery period mandates that the motion be denied. The failure to establish that it did not have access to the alleged privileged materials in Blasco's file and to explain why the questions now so important to its case were not asked Blasco during the 900 plus page Blasco deposition also require denial of the motion.

Next, Alaska Trams filed a motion for a preliminary injunction. Given the decision on the motions for summary judgment, this motion is denied. Keen has failed to show irreparable harm. Furthermore, as has always been the case, Keen is free to apply for a new permit.

Alaska Trams filed a motion to file a supplemental affidavit on September 30, 1993, a notice concerning the gift cart permit on January 10, 1994, and a motion to supplement the record on January 24, 1994. The two motions are granted and the court has reviewed the affidavit and documents in reaching summary judgment decisions. The notice is also accepted for filing and has been considered as well.

Finally, the City has moved to strike certain materials filed by Alaska Trams on September 20, 1993. The City argues that the petitions and news articles supporting the tram are not relevant. The court agrees. These documents have been reviewed and the court can find no legitimate evidentiary or legal purpose for the materials. Alaska Trams' "Notice of Filing" is stricken from the record. The City asks for costs for having to file the motion. This request is

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[16] The court normally would have waited for the City's response to the last motion to supplement the record. However, further delay is not appropriate.

partially granted. pursuant to Rule 95(a), the plaintiffs are to pay the defendants the sum of $300 for having to file the motion.

Dated at Sitka, Alaska, this 31st day of January, 1994

Larry C. Zervos
Superior Court Judge